

No. 12284

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United States  
Court of Appeals  
For the Ninth Circuit.

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CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
District of Idaho, Eastern Division.

FILED  
AUG 31 1949

PAUL P. O'BRIEN,  
CLERK



No. 12284

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United States  
Court of Appeals

For the Ninth Circuit.

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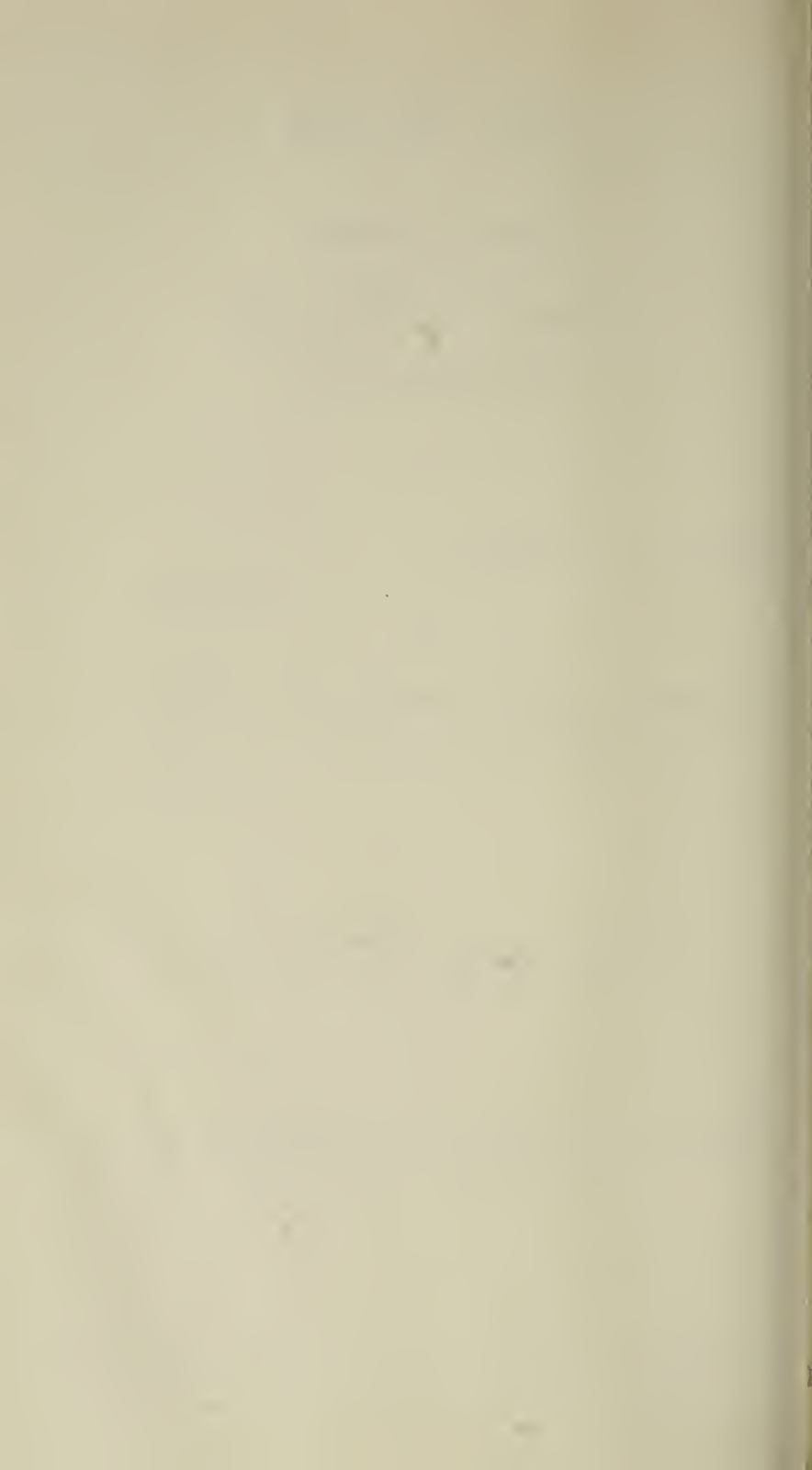
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

BEN W. DAVIS,

Attorney for Plaintiff,  
Pocatello, Idaho.

MERRILL AND MERRILL,

Attorneys for Defendant,  
Pocatello, Idaho.

In the District Court of the United States for the  
District of Idaho, Eastern Division

1462

CECELIA J. WILSON,

Plaintiff,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a Corporation,

Defendant.

### COMPLAINT

Plaintiff complains of defendant and alleges.

#### I.

That plaintiff is a citizen and resident of the State of Idaho; that defendant is a corporation incorporated under the laws of the State of Missouri with its principal place of business at Kansas City, Missouri; that the matter in controversy exceeds exclusive of interests and costs the sum of \$3,000.00.

#### II.

That defendant on or about the 21st day of August, 1937, issued to Harry H. Wilson, now deceased, its certain policy of insurance, the policy providing indemnity in the amount of \$5000.00, for the loss of life caused by accidental means; that said policy provided for the payment of an annual premium which was paid each and every year by the deceased up until the time of his death on the 8th day of April, 1947; that the defendant is familiar with all of the terms and provisions of said policy.

and is familiar with the fact of the death of the deceased.

### III.

That there was and is due to the plaintiff, beneficiary under said policy, the sum of Five Thousand Dollars (\$5,000.00) with interest thereon at six per cent per annum from the 8th day of April, 1947, by reason of the death of the deceased, her husband, caused by accidental means, which sum the defendant has at all times refused to pay.

Wherefore, plaintiff prays that she have and recover judgment against the defendant in the sum of Five Thousand Dollars with interest thereon at six per cent per annum from the 8th day of April, 1947; for all costs of suit herein expended and plaintiff prays for general relief.

/s/ B. W. DAVIS,

Attorney for Plaintiff.

[Endorsed]: Filed July 5, 1949, U.S.C.A.

[Endorsed]: Filed Oct. 30, 1947, V.S.D.C.

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[Title of District Court and Cause.]

### MOTION TO DISMISS, MOTION FOR A MORE DEFINITE STATEMENT AND MOTION TO STRIKE

Comes now the Business Men's Assurance Company of America, a corporation, defendant in the above-entitled action, and moves the Court as follows:

## I.

To dismiss said action upon the ground and for the reason that the complaint fails to state a claim against this defendant upon which relief can be granted against it.

## II.

Without waiving the foregoing motion, but expressly relying thereof, and in order to enable defendant to properly prepare its responsive pleading, this defendant further moves to require the plaintiff to make a more definite statement of her alleged cause of action as follows:

(a) To state whether or not she has complied with each and all of the provisions of said policy of insurance.

(b) To state the character and nature of the alleged accident, how it happened, and the provision of the insurance policy plaintiff will contend covered the same.

(c) To state whether or not proofs of death as provided in the policy have been submitted.

(d) To submit bill of particulars stating the ultimate facts concerning the alleged accident, when and where it happened and the approximate cause of said death.

## III.

Without waiving either of the foregoing motions, but expressly relying thereon the defendant moves that there be stricken from the complaint the following allegation:



“that the defendant is familiar with all of the terms and provisions of said policy and is familiar with the fact of the death of the deceased and the circumstances surrounding the same.”

upon the ground and for the reason that the same does not state a cause of action, or any part of a cause of action, and is a conclusion.

These motions are made individually and separately but consolidated pursuant to Rule 12 (g) of the Rules of Civil Procedure.

Wherefore Defendant prays said motions, and each of them, be granted and that the defendant be given the relief sought thereby.

/s/ MERRILL & MERRILL,  
Attorneys for Defendant.

Service of foregoing Motion admitted to have been made this 18th day of November, 1947.

/s/ B. W. DAVIS,  
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 20, 1947.

[Title of District Court and Cause.]

#### MINUTES OF THE COURT, JAN. 13, 1948

After hearing respective counsel on defendant's Motion to Dismiss, for More Definite Statement, and Motion to Strike, the Court announced that the Motion to Strike would be granted by striking the remainder of Paragraph II, after the word “deceased,” in line 9. The other Motions will be denied,

and defendant can obtain information desired by interrogatories. Defendant given 20 days to Answer.

January 13, 1948.

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[Title of District Court and Cause.]

### ANSWER

Defendant answers the complaint of the plaintiff as follows:

#### I.

Defendant admits the allegations contained in paragraph numbered I of said complaint.

#### II.

Answering paragraph numbered II of said complaint defendant admits that on or about the 21st day of August, 1937, it issued to Harry H. Wilson, now deceased, its certain policy of insurance, which policy provided for indemnity in the amount of \$5,000.00 for loss of life caused by accidental means, but only as defined and described in said policy, and admits that said policy provided for the payment of an annual premium, but denies each and every other statement, claim, or allegation contained in said paragraph.

#### III.

Answering paragraph numbered III of said complaint defendant admits that it has refused to pay the money claimed, but denies that said deceased died through accidental means, within the coverage,

of said policy and denies that said plaintiff has complied with all of the provisions of said policy.

IV.

Defendant denies each and every other allegation or claim in said complaint not herein specifically admitted.

Wherefore Defendant having fully answered said complaint prays that plaintiff take nothing by reason thereof and that it may recover its costs incurred herein.

/s/ A. L. MERRILL,

/s/ R. D. MERRILL,

Attorneys for Defendant.

Service acknowledged Feb. 2, 1948.

[Endorsed]: Filed Feb. 3, 1948.

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[Title of District Court and Cause.]

AMENDED ANSWER

Defendant answers the complaint of the plaintiff as follows:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations contained in paragraph numbered I of said complaint.

## II.

Answering paragraph numbered II of said complaint defendant admits that on or about the 21st day of August, 1937, it issued to Harry H. Wilson, now deceased, its certain policy of insurance, which policy provided for indemnity in the amount of \$5,000.00 for loss of life caused by accidental means, but only as defined and described in said policy, and admits that said policy provided for the payment of an annual premium, but denies each and every other statement, claim, or allegation contained in said paragraph.

## III.

Answering paragraph numbered III of said complaint defendant admits that it has refused to pay the money claimed, but denies that said deceased died through accidental means, within the coverage of said policy and denies that said plaintiff has complied with all of the provisions of said policy.

## IV.

Defendant denies each and every other allegation or claim in said complaint not herein specifically admitted.

## Third Defense

## I.

That the insurance policy written by the defendant insured Harry H. Wilson against loss resulting directly and independently of all other causes from bodily injuries sustained during any term of the policy and effected solely through accidental means,

subject to the provisions and conditions and limitations contained therein; that said policy was written and signed in Kansas City, Missouri, and became effective at said time and place, and must be construed under the laws of said state.

## II.

That the said policy further provides that the accident insurance under said policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions and limitations specified in said policy, except, among others, "those caused wholly or partly, or the results of which are contributed to, by bodily or mental infirmity, hernia, \* \* \* or by any disease or medical or surgical treatment therefor, such hernia, \* \* \* or medical or surgical treatment to be construed as sickness."

## III.

That shortly prior to the death of Harry H. Wilson, he was operated on for hernia and that such bodily infirmity and operation wholly or partly caused or contributed to his death in such manner as to be within the exclusions of said policy.

## IV.

That the death of Harry H. Wilson was not, or the result directly and independently of all other causes of bodily injuries, affected solely through accidental means within the meaning and terms and conditions of said policy of insurance and the defendant never became and is not now liable thereunder.

## Fourth Defense

That said policy of insurance, among other things, provides that written notice of the injury upon which claim is based must be given to the company within twenty days after the accident causing such injury and that upon receipt of said notice the company will furnish the claimant with such forms as are usually furnished by it for filing proofs of loss and that affirmative proof of loss must be furnished to the company at its office within ninety days after the claim of such injury; that the plaintiff herein advised the company of decedent's death and thereupon said company transmitted the usual forms for preparation filing and return consisting of a claimant's statement, a doctor's statement, a mortician's statement and the statement of an eye witness; that the plaintiff did not submit said forms within the ninety days provided and has never submitted the doctor's statement nor the statement of an eye witness and the said plaintiff has not conformed with the standard provisions of said policy in the giving of proof as required therein nor establishing any right to claim under said policy if any rights otherwise existed which defendant herein denies.

Wherefore Defendant having fully answered said complaint prays that plaintiff take nothing by reason thereof and that it may recover its costs incurred herein.

/s/ A. L. MERRILL,

MERRILL & MERRILL,

Attorneys for Defendant.

Service acknowledged Feb. 20, 1948.

[Endorsed]: Filed March 8, 1948.



[Title of District Court and Cause.]

## MINUTES OF THE COURT, MARCH 17, 1948

After hearing respective counsel on defendant's motion to amend amended answer, the Court granted said motion subject to plaintiff's objection.

Respective counsel at this time stipulated that the testimony given in this cause of action would also run to case No. 1462.

Whereupon, this cause came on for trial before the Court, B. W. Davis representing the plaintiff and A. L. Merrill representing the defendant. Upon permission of the Court and agreement of counsel, it was ordered that counsel for the defendants in cases 1462 and 1463 could examine and cross-examine witnesses in this cause of action.

After hearing a statement of the case, Dr. O. F. Call, Dr. W. W. Brothers, Walter M. Jones and Laura S. Gough were sworn and examined as witnesses and documentary evidence was introduced on the part of the plaintiff, and here the plaintiff rests.

Dr. Melvin Graves and Walter M. Jones were sworn and examined as witnesses and documentary evidence was introduced on the part of the defendant and here the defendant rests, and both sides close.

It was stipulated that the depositions of Dr. Joseph Beeman, Dr. F. A. Pittenger, Dr. James L. Stewart and Dr. O. F. Swindell be copied into the record.

The Court ordered that argument be submitted on briefs, the plaintiff being granted 20 days for open-

ing brief, defendant 20 days thereafter to reply, and plaintiff 15 days to reply to reply brief. The time for filing briefs to commence the date of filing of the transcript of testimony.

March 17, 1948.

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[Title of District Court and Cause.]

### OPINION

Ben W. Davis, Pocatello, Idaho, Attorney for the Plaintiff.

Messrs. Merrill & Merrill, Pocatello, Idaho, Attorneys for the Defendant.

Clark, District Judge.

The facts were fully set forth in the case of *Wilson v. New York Life Insurance Company* recently decided by this Court. The Court adopts that opinion in so far as it is applicable here, however, there are two additional questions in this case:

First, as to whether the Idaho law is controlling or the law of the State of Missouri.

The Court is of the opinion that the insurance policy is to be interpreted in accordance with the rules of law in this jurisdiction.

The second question is concerning the limitation clause in the policy. This is the limitation clause which excepts the defendant from liability from "injuries, fatal or otherwise \* \* \* caused wholly or partly, or the results of which are contributed to \* \* \* by \* \* \* hernia, \* \* \* or medical \* \* \* treatment therefor." The policy states plainly hernia or



medical treatment therefor is to be construed as sickness.

The insured was operated on for hernia; the medical treatment was administered to aid recovery; the medical treatment caused his death; his death was unforeseen and unexpected.

Regardless of how foolish it is to say that such an accident is sickness, that is the wording of the policy. In this case the Court feels it necessary to follow the wording of the policy, that hernia and medical treatment therefor is to be construed as sickness, and that the plaintiff is not entitled to recover.

Counsel for the defendant will prepare the findings of fact, conclusions of law and judgment. These findings will be prepared to conform with the opinion of this Court filed in the case of *Wilson v. New York Life Insurance Company* except that there will be a finding here as to the Idaho Law controlling, and a finding of the Court as to the limitation clause of the policy regarding "hernia or medical treatment therefor" which will be in conformity with this memorandum.

Copy of the findings, conclusions and judgment will be served on counsel for the plaintiff and the original submitted to the Court for approval.

[Endorsed]: Filed March 24, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT, MAY 20, 1949

This cause came on regularly this date in open court for hearing on Findings of Fact and Conclusions of Law, B. W. Davis representing the plaintiff and A. L. Merrill the defendant.

The Court ordered counsel for plaintiff to amend his Proposed Findings of Fact and Conclusions of Law, and stated that judgment would be entered in compliance therewith.

May 20, 1949.

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[Title of District Court and Cause.]

No. 1462

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

The above-entitled cause having heretofore been submitted to the court without a jury, by agreement of counsel for the respective parties, upon issues framed by plaintiff's complaint and the answer of the defendant, as amended, and evidence having been submitted on behalf of plaintiff and defendant and written briefs having been prepared and filed by the respective parties and the Court having carefully considered said briefs and the evidence in said cause and having heretofore, on the 24th day of March, 1949, filed its written opinion, the Court now makes the following:

## Findings of Fact

## I.

That plaintiff at all times from and after the filing of her complaint up to and including the time that said matter was fully submitted to the Court, was a resident of the State of Idaho and during said time, the defendant was a Missouri Corporation, and that the sum in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

That defendant, on or about the 24th day of August, 1937, issued to Harry H. Wilson, then living and now deceased, its certain policy of insurance, the said policy providing indemnity in the amount of \$5,000.00 for the loss of life caused by accidental means; that said policy provided for the payment of an annual premium, which was paid by the insured each and every year until the time of his death on the 8th day of April, 1947, and that the premium payments due upon said policy had been paid in full at the time of the death of the Insured and that said policy had not lapsed.

## III.

That Harry H. Wilson died of accident or by accidental death on the 8th day of April, 1947.

## IV.

That prior to the accidental death of Harry H. Wilson, who was past 61 years of age, he was in the ordinary good health of the average man at that age.

## V.

That he was operated on for hernia on the 7th day of April, 1947, and that prior thereto he was given a careful examination by a skilled physician and surgeon who was a man of broad experience in his profession and who was a competent and experienced surgeon; that there was no indication that the patient at that time was not in good physical condition and the proper subject of a simple hernia operation.

## VI.

That the patient appeared normal in every respect following said operation; did not suffer any shock and did not die as a result of said hernia operation.

## VII.

That the death of Harry H. Wilson was caused by choking or coughing or violent snoring or by choking, coughing and violent snoring which caused and resulted in an embolism causing the death of the insured.

## VIII.

That the insured was given sedatives and opiates which caused the violent coughing, choking and snoring and which unexpectedly and accidentally caused the death of said insured.

## IX.

That the coughing, choking and snoring of the patient was extremely violent, extraordinary and not to have been foreseen and entirely beyond the experience of his attending physician in previous and similar conditions.

## X.

That the administration of opiates and sedatives was a reasonable and ordinary procedure to be followed by the attending physician; that the result thereof, causing the violent choking, snoring and coughing were tragical and out of proportion to the trivial cause and was an accident and resulted in death by accident.

## XI.

That the opiates and sedatives administered to the insured prior to his death were externally administered.

## XII.

That following the operation for hernia the opiates and sedatives were administered as medical treatment.

## XIII.

That the said insurance policy, among other provisions, contained the following:

The accident insurance under this policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions, and limitations specified in this policy, except:

Those caused wholly or partly, or the results of which are contributed to by bodily or mental infirmity, hernia \* \* \* or any \* \* \* medical or surgical treatment therefor. Such hernia \* \* \* medical or surgical treatment to be construed as sickness.

## XIV.

That immediately after the death of the insured and within twenty days thereafter, written notice

of the death of the insured was given to the defendant; that thereafter, the plaintiff, who was very ill, and in no physical condition to attend to normal business affairs, furnished such proofs of loss to the defendant as were submitted to her; that in the giving of the notice of the death of the insured and the submission of proofs of loss, the plaintiff, the beneficiary, substantially complied with the terms of said insurance policy and that no prejudice resulted to the defendant in any way by reason of the manner of the giving of notice to the defendant and of the filing of proof of loss.

#### XV.

That the insured made application for the said insurance policy issued by the defendant in the State of Idaho and was examined by a physician in the State of Idaho and that said policy was delivered to him in the State of Idaho.

#### Conclusions of Law

##### I.

That the death of the insured, Harry H. Wilson, was accidental.

##### II.

That the plaintiff, the beneficiary, substantially complied with the provisions of the insurance policy issued by the defendant as to giving notice and furnishing proofs of loss.

##### III.

That the law of the State of Idaho is controlling in this cause and that the insurance policy, the facts



and the law applicable thereto, are to be interpreted in accordance with the rules of law in the State of Idaho.

## IV.

That by reason of the provisions of the limitation clause in said insurance policy, providing generally as follows:

The accident insurance under this policy covers all bodily injuries, fatal or otherwise, subject to the provisions, conditions, and limitations specified in this policy, except:

\* \* \*

Those caused wholly or partly, or the results of which are contributed to by bodily or mental infirmity, hernia \* \* \* or any \* \* \* medical or surgical treatment therefor. Such hernia \* \* \* medical or surgical treatment to be construed as sickness, the plaintiff is not entitled to recover from the defendant in this cause.

## V.

In this cause the court feels it necessary to follow the wording of the policy—that medical treatment after a hernia operation is to be construed as sickness, solely because it is so stated in the policy and for that reason plaintiff is not entitled to recover.

Dated this 31st day of May, 1949.

/s/ CHASE A. CLARK,

U. S. District Judge.

[Endorsed]: Filed May 31, 1949.

[Title of District Court and Cause.]

MINUTES OF THE COURT, MAY 31, 1949

After hearing respective counsel, the Court ordered that the record show that Findings of Fact and Conclusions of Law were prepared under the directions of the Court and neither counsel is responsible for the preparation of same.

Thereupon, the Court signed the Findings of Fact and Conclusions of Law, and Judgment, and ordered the same filed herein.

May 31, 1949.

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[Title of District Court and Cause.]

No. 1462

JUDGMENT

This cause came regularly on for trial before the Court sitting without a jury, upon the issues framed by the Complaint of the plaintiff and the Amended Answer of the defendant thereto. A trial by jury was expressly waived. Evidence was introduced and said matter was argued, briefed, and submitted to the Court for decision. The Court having rendered its decision and made and entered its Findings of Fact and Conclusions of Law now renders its judgment in accordance therewith:

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that the plaintiff take nothing by reason of her complaint and that the action be, and it is hereby, dismissed on the merits, and that defendant have and recover from the plaintiff its costs



in this action and defendant have execution therefor.

Dated this 31st day of May, 1949.

/s/ CHASE A. CLARK,  
U. S. District Judge.

[Endorsed]: Filed May 31, 1949.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice is hereby given that Cecelia J. Wilson, plaintiff above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from the final judgment entered in this action on the 31st day of May, 1949.

/s/ B. W. DAVIS,  
Attorney for Cecelia J.  
Wilson.

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[Title of District Court and Cause.]

CIVIL ACTION No. 1462  
BOND ON APPEAL

Know All Men by These Presents, that Great American Indemnity Company, New York, a corporation as Surety, and Cecelia J. Wilson as Principal, are held and firmly bound unto Businessmen's Assurance Company of America, a corporation, in the sum of Two Hundred Fifty & 00/100 (\$250.00) to which we bind ourselves, our successors and assigns, jointly and severally.

Sealed With Our Hands, and dated this 23rd day of June, 1949.

Whereas, on the 31st day of May, 1949, in the above-entitled action, In the District Court of the United States for the District of Idaho, Eastern Division, between Cecelia J. Wilson, plaintiff above named, and said Business Men's Assurance Company of America, a corporation, defendant above named, a judgment was rendered against said plaintiff and said plaintiff has duly filed a notice of appeal from said judgment;

Now, the Condition of This Bond is that if said Appeal is dismissed or the judgment affirmed, all costs incurred by the defendant or such costs as the Appellant Court may award in the event such judgment is affirmed; that the payment of said costs is hereby secured, otherwise, this obligation is to be void.

The undersigned agree that this is a bond on appeal from the Federal District Court to the Circuit Court of Appeals given under the obligation of Paragraph (c) of Rule 73 of the Federal Rules of Civil Procedure.

CECELIA J. WILSON.

By /s/ B. W. DAVIS,

Her Attorney.

GREAT AMERICAN INDEMNITY COMPANY,  
NEW YORK.

[Seal] By /s/ CHAS. KIRCHNER,

Its Attorney-in-Fact.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

## STATEMENT OF POINTS

Appellant states that the points upon which she intends to rely on appeal in the above-entitled action are as follows; and she deems the entire record on appeal as necessary for consideration of the points to be relied upon, to wit:

### I.

That the court erred in his conclusion of law that the plaintiff was not entitled to recover, for the reason that the plaintiff, having proven and the court having found that the death of the deceased was caused by accident and that the cause of the accident was violent choking, snoring and coughing, brought on by the administration of opiates and sedatives, the Court could not and should not, as a matter of law, regardless of the terms of the Insurance Policy, conclude that the cause of death was sickness.

### II.

That the word "sickness" has a well-defined meaning; that it is a diseased condition, illness or nausea and that the defendant, the Business Men's Assurance Company of America, could not and should not be allowed to give to the word "sickness," unusual or unaccustomed meaning, or to provide in a policy to the detriment of the policyholder that medical or surgical treatment should be construed as sickness.

### III.

That the cause having been determined and gov-

erned by the Rules of Law of the State of Idaho, it was the duty of the court to construe the policy most favorably to the insured, which the court failed to do, when he gave to the word "sickness," a construction inserted in the policy of insurance by the defendant, that was unusual and subject to more than one construction.

#### IV.

That if the defendant, the Insurance Company, issuing its policy of insurance, intended that the beneficiary of the insured could not recover in any event for any accident following a hernia operation, the policy should have so provided, and not so providing, but being an accident policy, the rights of the beneficiary could not be destroyed by ambiguous language.

#### V.

That the Business Men's Assurance Company, a corporation, defendant, issued its policy to the deceased in conformity with the laws of the State of Idaho and is and was bound by the laws and the decisions of said State, and under the same, the plaintiff is entitled to recover by reason of the fact that the death of the insured was an accident and that an accidental injury and resulting death, is not and cannot be construed as sickness.

#### VI.

That the plaintiff having established death by accident, the burden of proof was upon the insurance company, the defendant, to prove that the exceptions in the policy defeated recovery and that the defend-

ant failed to prove that the cause of the death of the deceased was sickness. The only basis for the court's conclusion of law that the plaintiff could not recover, being set forth in Conclusion No. V as follows:

“In this cause, the court feels it necessary to follow the wording of the Policy \* \* \* that medical treatment after a hernia operation is to be construed as sickness \* \* \* solely because it is so stated in the policy and for that reason plaintiff is not entitled to recover.”

#### VII.

That it was the duty of the court under the applicable law and the facts to give to the language and provisions of the insurance policy, the usual and ordinary construction of the same and to give to the word “sickness,” its usual meaning and construction, which the court failed to do.

#### VIII.

That the court erred in entering judgment for the defendant for the reason that the Findings of Fact, made and entered by the Court to the general effect that the death was purely accidental, and that the result thereof was tragical and out of proportion to the trivial cause, precluded the court as a matter of law from entering judgment in favor of the defendant and against the plaintiff.

/s/ B. W. DAVIS,

Attorney for Cecelia J.

Wilson.

[Endorsed]: Filed June 24, 1949.

[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

Cecelia J. Wilson, Appellant herein, designates the complete record and all proceedings and evidence in the above-entitled action to be contained in the record on appeal and the Clerk will please prepare such record on appeal herein, including but not limited to the following:

1. Complaint.
2. Answer of the defendant.
3. Amended answer of defendant.
4. Transcript of the evidence.
5. All exhibits.
6. Opinion of the court dated March 24, 1949.
7. Findings of Fact and Conclusions of law dated May 31, 1949.
8. Judgment dated May 31, 1949.
9. Notice of Appeal.
10. Bond on Appeal.
11. This designation.
12. Statement of points.

Dated this 23rd day of June, 1949.

/s/ B. W. DAVIS,

Attorney for Plaintiff  
and Appellant.

[Endorsed]: Filed June 24, 1949.



[Title of District Court and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

Business Men's Assurance Company of America, a corporation, the above-named respondent, hereby designates additional portions of the record to be included on appeal in this cause, in addition to those recited in Designation of Record on Appeal heretofore filed by the appellant, to wit:

1. Defendant's Motion to Dismiss, Motion for a More Definite Statement and Motion to Strike.
2. The Minute Entry of January 13, 1948.
3. The Minute Entry of March 17, 1948.
4. The Minute Entry of May 20, 1949.
5. The Minute Entry of May 31, 1949.
6. This Designation.

Dated this 30th day of June, 1949.

/s/ A. L. MERRILL,  
R. D. MERRILL,  
MERRILL & MERRILL,

Attorneys for Defendant and  
Respondent.

Service of foregoing Designation by Appellee of Additional Portions of Record on Appeal admitted this 30th day of June, 1949.

/s/ B. W. DAVIS,  
Attorney for Plaintiff and  
Appellant.

[Endorsed]: Filed July 1, 1949.

[Title of Court and Cause]

## CERTIFICATE OF CLERK

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers, to-wit:

Complaint

Motion to Dismiss, Motion for a More Definite Statement and Motion to Strike

Minutes of the Court of January 13, 1948.

Answer

Amended Answer

Minutes of the Court of March 17, 1949

Opinion

Minutes of the Court of May 20, 1949

Findings of Fact and Conclusions of Law

Minutes of the Court of May 31, 1949.

Judgment

Notice of Appeal to Circuit Court of Appeals

Bond on Appeal

Statement of Points

Appellant's Designation of Record on Appeal

Appellee's Designation of Additional Portions of Record on Appeal



Exhibits:

Plf. No. 1 Letter from B. W. Davis to Business Men's Assurance Co., 4/21/47

Plf. No. 2 Letter from Co. to B. W. Davis, 5/2/47

Plf. No. 3 Letter from B. W. Davis to Co. 7/9/47

Plf. No. 4 Letter from Co. to B. W. Davis, 7/18/47

Plf. No. 5 Beneficiary's Statement, 7/9/47

Plf. No. 6 Undertakers Statement, 7/9/47

Def. No. 9 Photostatic copy, Proof of Death

Def. No. 10 Photostatic copy, Certificate of Death.

Transcript of Testimony

are that portion of the original files as designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 1st day of July, 1949.

[Seal]      /s/ ED. M. BRYAN,  
Clerk.

[Title of District Court and Cause.]

### TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, United States District Judge, Sitting at Pocatello, Idaho, without a jury.

Appearances:

Ben W. Davis, Esq., Pocatello, Idaho, Attorney for the Plaintiff.

Messrs. Merrill & Merrill, Pocatello, Idaho, Attorneys for the Defendant.

March 17, 1948, 10 o'clock A.M.

Mr. Merrill: I have a motion for an amendment of the amended answer as the same appears in the motion which has been filed here.

Mr. Davis: I have no objection as to the time of the filing of the amendment but I do object to the filing of it for the reason, and I object to the granting of the motion to amend for the reason that it doesn't present any defense. It pleads the law of Missouri generally as to policies and the policy sued on does not have any reference to the fact that it is governed by the laws of Missouri. If the laws of Missouri governs I am satisfied that the Court will take judicial notice of that law.

The Court: I will permit the amendment subject to the objection and I will determine that at the conclusion of this matter.

Mr. Davis: The other case is set for this time

and so far as the medical testimony is concerned, it is agreeable to me and it may be agreed and stipulated that the medical evidence is applicable to both cases.

The Court: Very well, but in order not to confuse the record, if it is agreeable to counsel, and a record is later made up, it can be agreed that the Court Reporter may, in making up the record, use the same testimony and [4\*] transcribe it in full in both the records, otherwise it would be confusing to have a record here show evidence in both cases in one record,—you see all I am thinking about,—while I am not viewing or contemplating an appeal but in case there is an appeal the record would be very confusing unless testimony was introduced in each trial. The cases are not consolidated for trial.

Mr. Merrill: That is right, they are not consolidated.

The Court: Why can't it be understood that we are trying the first case and that at the commencement of the next case you shall make another stipulation as to the record.

Mr. Merrill: I think that can be done.

Mr. Eberle: Yes. And Your Honor, could it be agreed that we may both cross-examine the witnesses, both Mr. Merrill and myself because of the difference in the defendants in each case.

The Court: I can see no objection to that. Then when we try the second case it may be agreed now that any portion of the record designated may be introduced in the second case.

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\* Page numbering appearing at bottom of page of original certified Transcript of Record.

Mr. Davis: That is entirely agreeable to me, and it is also agreeable that both counsel may examine.

The Court: Then you may proceed.

Mr. Merrill: Of course, we are trying the Business Men's case first. [5]

The Court: That is my understanding.

Mr. Davis: Mr. Merrill, do you have the original letter or notice that I mailed to the Business Men's Assurance Company on April 27?

Mr. Merrill: Yes, I think I do.

Mr. Davis: Now, may I have this marked as plaintiff's exhibit?

The Court: It may be marked plaintiff's exhibit 1.

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DR. O. F. CALL

being called as a witness on the part of the plaintiff after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Doctor, will you state your name?

A. O. F. Call.

Q. Where do you reside?

A. Pocatello, Idaho.

Q. What profession do you follow?

A. Physician and surgeon.

Q. What college or school did you attend?

A. Jefferson Medical College, Philadelphia.

Q. Are you a member of any medical society?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

The Court: I wonder if counsel can't admit this man's qualification. I know I will take judicial notice of his qualifications. [6]

Mr. Davis: I did think to show the amount of practice.

The Court: Certainly you may do so.

Mr. Davis: No, when the Court makes a suggestion I will not go against that.

Q. I will simply ask how long you have practiced, Doctor? A. Since 1920.

Q. Have you done any Post Graduate work?

A. Yes, sir.

Q. When?

A. In 1926 one winter in New York studying surgery, and an entire year in 1930 in the University of Pennsylvania post graduate surgery.

Q. You have attended in the past, or gone to Mayo's Clinic to study their technique?

A. Yes, frequently, about every other year.

Q. Doctor, you knew Mr. Wilson—Harry Wilson, deceased? A. Yes, sir.

Q. How long had you known him?

A. About twenty years.

Q. You had been his physician?

A. Yes, sir.

Q. How long had you been his physician?

A. All of that time.

Q. Doctor, prior to this operation you performed what was Mr. Wilson's general condition? [7]

A. He had ordinary good health of the average

(Testimony of Dr. O. F. Call.)

man with the exception that he had had an operation about four years ago at the Mayo Clinic, that is, four years before this last operation. He had ordinary colds the same as the average man and a little difficulty with hypertension—high blood pressure.

Q. What was this operation on April 7 for?

A. Recurrent inguinal hernia.

Q. What was his general condition when he went into the hospital?      A. Very good.

Q. That is before this last operation?

A. Yes, it was very good.

Q. When was this operation performed?

A. April 7, I think it was at eight in the morning.

Q. A regular chart was kept, a regular hospital chart written by the nurse was kept in this case?

A. That is right.

Q. Is it ordinary and customary for a nurse to report on the chart the fact that the patient snores?

A. Not ordinary.

Q. Is there a report on the chart here of continuous and loud and violent snoring by this patient?

A. Yes, sir, there is, the nurse made several reports of loud, continuous snoring, more than she had heard in other cases and she was assured——

Q. What was that, Doctor? [8]

A. She was assured that was a common thing with Mr. Wilson, that he always snored.

Q. What was the nature of Mr. Wilson's snoring in the hospital prior to his passing?



(Testimony of Dr. O. F. Call.)

Mr. Merrill: Are you referring now to his personal knowledge.

Q. Personal knowledge, Doctor, do you have personal knowledge of it?

A. Yes, I was there and heard him snoring.

Q. Was it violent and almost a spasm, would you say?

A. Sometimes you would think that he would shut off his breath and then he would catch his breath with a jerk.

Q. And would the patient jerk or move?

A. Yes, sir, he would rather jerk.

Q. Did he have an accumulation of phlegm or coughing spells?

A. No, I wouldn't say,—well, after snoring he would have a slight cough like that (indicating).

Q. Do you have the chart with you, Doctor?

A. I think it is in the Court room.

Mr. Davis: We offer in evidence exhibit marked exhibit 7, the original chart from the hospital and counsel for the defendant has taken photographic copies of this instrument and we would like to have it understood that a photographic copy may be used if the matter should remain in Court any considerable time so that the original could be returned. [9]

The Court: It may be introduced subject to withdrawal.

Q. Now, Doctor, I call your attention to the——

The Court: ——You understand that the photostatic copy may be used in lieu of this original after the trial of this case.



(Testimony of Dr. O. F. Call.)

Mr. Davis: Yes, that was my understanding. This is plaintiff's exhibit 7.

Q. I call your attention to the nurse's bedside chart or bedside notes, and to the fact that it refers twice to the fact that he was coughing, and that something was given for the cough. If the record shows that it would indicate that he was coughing?

A. Certainly.

Q. How many operations for hernia have you performed during your practice?

A. I have been doing them for twenty odd years, I would say four or five hundred.

Q. Out of that four or five hundred how many post-operative deaths have occurred in your operations for hernia? A. This one case only.

Q. Did you give this case the same general care and attention that you gave the others?

A. Yes, sir.

Q. The same attention you gave all of them?

A. Yes, sir. [10]

Q. Doctor Call, can you or would you say that post operative death from hernia is a very rare occurrence?

A. Yes, it is.

Q. What do you base that statement upon?

A. I base that upon my own experience that I have mentioned and the various clinics around the country; the statistics that we have gathered.

Q. In the case of Mr. Wilson was there anything that could have been reasonably anticipated,

(Testimony of Dr. O. F. Call.)

or was there any reason for you to expect a post operative death?      A. No.

Q. Or death by pulmonary embolism?

A. No reason that I could expect in relation to the operation.

Q. If there had been any reason for you to expect that would you have operated?      A. No.

Q. Generally in the medical profession and following the usual standards, if there is anything to indicate, or the percentage of cases show that there is a likelihood of death or that you could anticipate death would you operate?

A. I don't think that there is a surgeon in the country that would operate if he thought the man was going to die.

Q. What was the cause, in your opinion, of Mr. Wilson's death?

A. Acute pulmonary embolism.

Q. What is pulmonary embolism? [11]

A. An embolism is a foreign substance or piece of a clot flowing in the blood stream which goes through the heart; through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance.

Q. It doesn't follow that it is a clot of blood?

A. Not necessarily.

Q. Was this pulmonary embolism caused by and a result of the hernia operation?

A. I don't think it would be anything per se connected with the operation.

(Testimony of Dr. O. F. Call.)

Q. I call your attention to the deposition of Doctor Beeman,—have you read the deposition of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor Stewart?      A. Yes, sir.

Q. Which were taken in this case?

A. Yes, sir.

Q. Now, I call your attention to the following answer by Doctor Beeman on page eight of the deposition where he was being questioned about this case and why there would be a pulmonary embolism and death, wherein he said: “For the reason that an operation for intestinal obstruction and repair of the hernia could easily have caused a venous thrombus at that time.” Now, Doctor, that was referring to a prior operation?      A. Yes, sir. [12]

Q. Continuing, “and the hernia operation on April 7, 1947, may have been the exciting factor in causing this venous thrombus to break down and form a pulmonary embolism”. Assuming that Doctor Beeman was correct in that premise and that a thrombus had been formed, it would not necessarily follow that even if there was a thrombus that it caused this particular embolism?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is not just clear to me, your question.

Q. Yes,—now assuming that Doctor Beeman is correct and that a thrombus may have occurred or formed previously and that it may have been the exciting factor, as he says, in the pulmonary embo-

(Testimony of Dr. O. F. Call.)

lism, now, there may be other things that would have been the exciting factor, too?      A. Yes, sir.

Q. The violent snoring that the man did, and the choking and the violent coughing may have been the exciting factor?      A. Yes, sir.

Q. And could have been?      A. Yes, sir.

Q. And in your opinion, Doctor, was that the cause?

Mr. Merrill: Objected to as leading?

The Court: It is somewhat leading, he may answer, however. It is a matter the Court has control of.

A. That is my opinion.

Q. Now, Doctor, I call your attention,—have you looked at [13] and studied and been given the definition of accident as defined in Webster's International Dictionary?      A. Yes, sir.

Q. In your opinion was the death of Mr. Wilson due to accident?      A. Yes, sir.

Q. Are you familiar with and have you studied and read this book written by TeLinde,—Richard W. TeLinde?      A. Yes, sir.

Q. This was published in 1947?      A. Yes, sir.

Q. Now, Doctor, I call your attention to a statement in there on page 87 in which he says: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery". You have read that?      A. Yes, sir.

Q. Do you agree with that?      A. I do.

Q. And I call your attention to another statement on the same page where he is also discussing

(Testimony of Dr. O. F. Call.)

pulmonary embolism and where he says that occasionally there is something else causing the plugging of the pulmonary circulation which causes death, such as bronchial obstruction and so on,—do you agree with that?

A. That is a well recognized fact.

Q. Coughing and violent snoring might cause the breaking loose of a clot or foreign substance that caused the pulmonary embolism? [14]

A. Yes, sir.

Q. And is it your opinion in this case that is what did cause it?

A. Yes, sir, that is right.

Q. I call your attention to the deposition of Doctor Beeman, and that reference is made to the fact that pulmonary embolism may come from immobilization. If as stated by Doctor Beeman there had been a thrombus,—if this man had a thrombus,—Doctor, what is the treatment for thrombus?

A. Rest and quiet.

Q. Mobilization would be absolutely the wrong treatment? A. Yes, sir.

Q. That is, if the man had a thrombus?

A. Yes, sir.

Q. Was this man treated the same as other patients following a hernia operation?

A. Yes, sir, the standard form of treatment?

Q. I call your attention to a question asked of Doctor Swindell on page 13 of the deposition the question is: "Is there any substantial difference in



(Testimony of Dr. O. F. Call.)

the symptomatology of a pulmonary embolism and a thrombus", and the answer is "No." What is your answer to that, Doctor?

A. A decided difference.

Q. What is the difference between a thrombus and embolism? [15]

A. A thrombus is a large, or any clot filling a vessel, and an embolism is a little particle of that clot floating. The symptoms of the thrombus would be swelling of the part involved, an interference with the circulation,—a pain in that area, and the symptoms of pulmonary embolism is an acute tragic pain in the chest.

Mr. Eberle: If you are going to continue with this form of examination I will have to object, it is not proper to compare the testimony of one witness with that of another. It is not proper to ask this witness if he agrees with the testimony of another witness.

The Court: The question has been answered, there is nothing before the Court now.

Q. Doctor Call, I am referring now to page 15, in the testimony of Doctor Swindell: "Would the same be true of immobilization as incident to surgical procedure?" The answer: "Yes, immobilization predisposes to the formation of thrombi and emboli". Now, Doctor, does immobilization predispose to the formation of thrombi?

A. Yes, sir.

Q. What is the difference between thrombus and thrombi?

(Testimony of Dr. O. F. Call.)

A. Thrombi is the plural of thrombus.

Q. I thought immobilization was the treatment for thrombosis?

A. That is right, I misunderstood you, I thought you were talking about embolism [16]

Q. Now here is the question, Doctor. "Would the same be true of immobilization as incident to surgical procedure?" And the answer: "Yes, immobilization predisposes to the formation of thrombi and emboli". Does immobilization predispose to the formation of thrombi? A. No.

Q. Was there any indication that Mr. Wilson was suffering—strike that, please,—at the time of Mr. Wilson's death is there any indication that there was a condition of profound shock?

A. No, sir.

Q. Why do you say that?

A. Because of the symptoms present. Profound shock means rapid feeble pulse, weak heart beat; a person in a general exhausted condition.

Q. Referring to exhibit 7, Doctor, which is the hospital record and the chart, do you recall what the man's pulse was at the time of passing away?

A. About seventy-two, it never went above eighty.

Q. Did it ever go above 72,—had it ever gone above seventy-two according to that?

A. I think there is one place recorded that it was between 72 and 80.

Q. There isn't anything to indicate that the person was suffering from shock at all?



(Testimony of Dr. O. F. Call.)

A. There is not [17]

Q. Have you, in addition to your general knowledge, within the last forty-eight hours, made a study to refresh your memory and to keep you advised, or to fully advise you as to the percentage of post operative deaths from pulmonary embolism in all kinds of abdominal surgery, not hernia, but all abdominal surgery? A. Yes, I have.

Q. What does the book of TeLinde, which I have referred to here, show the percentage of all operations to be at Mayo's Clinic?

A. Eight per cent, I think it is.

Q. No, it is five and eight-tenths per cent.

Mr. Merrill: I object to counsel testifying here.

Mr. Davis: May I show the book to the Doctor.

The Court: Yes, you may.

A. That is correct, five and eight-tenths per cent.

Q. Is the hernia operation such as you performed an abdominal or pelvic operation?

A. It is not.

Q. What is an abdominal operation?

A. You open the abdominal cavity.

Q. And what is a pelvic operation?

A. Where you open the pelvic cavity.

Q. What are the kinds of operations in which there is most danger of post-operative deaths and most pulmonary embolism? [18]

A. It is most common in female pelvic operations and in male prostate operations, and in operations in reference to the Billeni's system,—of fractures.

(Testimony of Dr. O. F. Call.)

Q. What about the operations in reference to hernia?      A. Scarcely mentioned.

Q. It is very rare, is that right?

A. It is very rare.

Q. Doctor Call, taking your own experience, in all operations you have performed over the period of years you have practiced would it exceed a thousand?

A. Yes, it is more than that, I would say several thousand.

Q. How many post-operative deaths from pulmonary embolism in all of those operations have you had?

A. I can, off-hand, think of three.

Q. Including this one?      A. Yes, sir.

Q. You have been and are Mrs. Wilson's physician?      A. Yes, sir.

Q. What was Mrs. Wilson's general condition in June and say up to the 15th of July of this year?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: It may be admitted, he may answer, this is subject to your objection. If on going into this matter the Court decides it is not material, then it will be stricken. I think you said July of this year. [19]

Mr. Davis: Of course, I meant July of last year.

A. Her health was very poor.

Q. Was it possible for you as her doctor or myself as her counsel, during the forepart of July or

(Testimony of Dr. O. F. Call.)

the last part of June to talk to her about matters in connection with her husband's death, or to transact any business with her in reference to her estate?

A. Such procedure would be very harmful to Mrs. Wilson.

Q. And it was your opinion that it should not be done?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer subject to your objection.

A. That is right.

Q. And that she should be left alone?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. That's right.

Q. What are the cardinal symptoms of pulmonary occlusion?

A. Occlusion means stopping.

Q. Would it be accompanied by pain?

A. Yes, it would be accompanied by quite severe pain.

Q. There is nothing to indicate that this man had coronary thrombosis or pulmonary occlusion.

Mr. Merrill: Objected to as leading [20]

The Court: It is leading but he may answer.

Mr. Davis: I will withdraw the question, it is not of any particular help. I think that is all, you may cross-examine.

(Testimony of Dr. O. F. Call.)

Cross-Examination

By Mr. Eberle:

Q. Did you give your deposition in this matter some time ago?      A. Yes, sir.

Mr. Eberle: May I have the deposition published?

The Court: It may be published. I think before you start on this examination we will take a ten-minute recess.

March 17, 1948, 11:05 A.M.

Mr. Davis: I would like to clear up one matter if I may before they take the witness.

The Court: Very well.

Q. Doctor Call, in asking my questions I asked you to give the cardinal symptoms of pulmonary occlusion. I used the word pulmonary instead of coronary. I meant coronary occlusion?

A. The symptoms are: intense pain, probably the most intense known to the human body; profound sweating, and one can hardly get his breath.

Q. Doctor, going back to post-operative death. What is your opinion from your own experience and based upon the study you have made of the authorities. Where death is due to [21] surgery,—due to pulmonary embolism and where pulmonary embolism is due to surgery, does that follow immediately or within twenty hours, or is it more likely to follow later?

A. It is more likely to follow from thirteen to twenty-one days later.

(Testimony of Dr. O. F. Call.)

Q. Thirteen to twenty-one days later?

A. That's right.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Eberle:

Q. Doctor Call, handing you exhibit 8 I will ask you if that is the deposition you gave recently in this case, and is exhibit A attached thereto a part of it?

A. Yes, sir, it is, that is correct.

Mr. Eberle: I offer it in evidence as a part of the cross-examination of this witness.

Mr. Davis: No objection.

The Court: It may be admitted.

Q. Exhibit A and exhibit 8 Doctor Call, exhibit A is that a photostatic copy of the hospital record?

Mr. Davis: Unless the doctor knows I will object. If he may have an opportunity to check it with the original.

The Court: Yes, certainly, when it is checked it may be substituted if that is your desire.

Q. When did you last see Mr. Wilson?

A. You mean at the hospital. [22]

Q. When did you last see Mr. Wilson on April 8?

A. I saw him just a few minutes after his death, that is the last I saw him.

Q. Someone there at the hospital called you?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. About what time in the morning of April 8 did they call you from the hospital?

A. About 4:30.

Q. In the morning? A. Yes, sir.

Q. Mr. Wilson had died before you arrived?

A. I immediately dressed and went over, as I got there he was expiring.

Q. It took you about a half hour to get there?

A. I was in bed when they called.

Q. Prior to that when was the last time you had seen Mr. Wilson?

A. Eleven o'clock in the evening.

Q. The evening of the seventh?

A. Yes, sir.

Q. And is your diagnosis of his death as a result of pulmonary embolism based upon the hospital record?

A. Based upon personal analysis of the case.

Q. At eleven o'clock when you last saw him did he show any indication of the terminal period?

A. No, sir.

Q. At eleven o'clock when you saw him there was no symptomatology [23] of acute heart failure?

A. That's right.

Q. When you saw him in the morning he was just about expired? A. Yes, sir.

Q. And on that—that is what you based your diagnosis on?

A. It would have to be on that and on the record.

Q. Is it difficult to diagnose death of pulmonary



(Testimony of Dr. O. F. Call.)

embolism as distinguished from acute heart failure?

A. I don't think so. I might say this: If you want to be absolutely certain—if you want absolute proof you would have to have a post-mortem.

Q. You cannot be absolutely sure without a post-mortem?

A. You have the record and all these circumstances——

Q. ——But, Doctor, when you arrived at the time of death, when you arrived at the hospital what did you find to base your diagnosis on?

A. The record of the nurse.

Q. What else?

A. He was expiring suddenly.

Q. Those two things are the only basis for your diagnosis?

A. That's right.

Q. How many times did you see Mr. Wilson between the time of the operation at eight or nine on the morning of the 7th and eleven o'clock that night?

A. I cannot tell you the exact number of times. I was in and out of the room several times. [24]

Q. You operated between eight and nine?

A. Yes, sir.

Q. And you went in again shortly after the operation?

A. Shortly after nine, I would say.

Q. He was under the anesthetic?

A. He had a spinal and he was not asleep.

Q. When did you see him again?



(Testimony of Dr. O. F. Call.)

A. In ten or fifteen minutes. I was there all morning taking care of hospital work. I saw him several times.

Q. Several times before noon, would you say?

A. Yes.

Q. In the afternoon when did you see him?

A. About four-thirty.

Q. When did you see him again?

A. I dropped in again around nine o'clock.

Q. About nine and then again about eleven that evening?

A. That's right.

Q. In your opinion, repair on this hernia was necessary?

A. It was very advisable. The man could live without it but it was very advisable.

Q. You wouldn't operate unless it was necessary?

A. To the reconstruction of good health it was necessary.

Q. The surgery you performed was in the method usually followed by skilled surgeons?

A. That's right. [25]

Q. Now then, Doctor, before you left at noon was there any snoring?

A. As he would drop off to sleep under the opiate.

Q. Under the opiate? A. Yes.

Q. He was snoring?

A. Of course, at times he was not asleep.

(Testimony of Dr. O. F. Call.)

Q. If he was asleep he was snoring?

A. Yes, sir.

Q. How often was he snoring?

A. I didn't keep track of that. I know I would talk to him and he would joke with me, but when he went to sleep he would be snoring.

Q. At nine o'clock he was snoring?

A. At nine o'clock he was joking about a bridge game part of the time.

Q. At eleven o'clock he was snoring?

A. Part of the time, yes.

Q. When did he start to cough?

A. During the night.

Q. Was he coughing at nine o'clock?

A. Between nine and eleven.

Q. You saw him about nine and again about eleven?

A. Yes.

Q. You wouldn't know except by the hospital record that he was coughing between nine and eleven? [26]

A. That is the only way I would know. I wasn't there to hear it.

Q. I think you said that embolism was not the result of the operation?

A. I don't think it had anything to do with the operation per se.

Q. What do you mean "per se"?

A. Per se is a direct connection. It would mean that the operation would have no direct connection, not the direct cause of death. It means, in and of itself.

(Testimony of Dr. O. F. Call.)

Q. In other words, it may have been the cause, but not in and of itself?

A. Not in and of itself.

Q. It may have been the cause?

A. It could have been the exciting cause.

Q. It could have contributed to the embolism?

A. Yes.

Q. If this would have happened without the operation is it your opinion that Mr. Wilson would have died—without the operation?

A. He might have been going down the street; he might have been coughing or snoring; he might have fallen.

Q. And, of course, he would have died?

A. Yes, sir, he could have.

Q. And he might have died at home, in bed? [27]

A. Absolutely.

Q. If the embolism was not caused by the operation, what in your opinion was it caused by?

A. Extreme coughing and snoring is enough to break loose a part of a thrombus and make the embolism.

Q. Was the coughing and snoring incident to the operation?

A. Partly connected with the operation. The sedative made him snore more than he would at other times.

Q. What pre-operative medication did you give?

A. I gave opiates and barbitrates.

Q. That would wear off in how long?

(Testimony of Dr. O. F. Call.)

A. In about six hours.

Q. What did you give after that?

A. Opiates.

Q. Is that usual in operations of this type?

A. Yes, sir.

Q. And the opiates putting him to sleep made him snore?      A. Yes, sir.

Q. Did you know that he snored?

A. Yes, sir, I did.

Q. You knew that was a hazard?

A. I knew that he always snored when he slept.

Q. Doctor, what did that cough come from?

A. As he snored a little phlegm would get in his throat, it would collect and drop in his throat, causing him to cough. [28]

Q. —coughing as you suggested could have caused the embolism, could a heart condition—

A. He didn't have a heart condition.

Q. Atelectasis of the lungs?

A. He didn't have atelectasis.

Q. Could it have come from immobilization?

A. Hardly.

Q. What could it have come from?

A. From the phlegm that came during his sleep and caused the coughing.

Q. What other possible causes?

A. The possible causes are numerous, he could have had metastatic congestion.

Q. Post-operative congestion?      A. Yes.

Q. If that was the case, it would be due to the operation?

(Testimony of Dr. O. F. Call.)

A. Yes, if he had that it would; I don't say he did have.

Q. What else could it have been?

A. The man could have had a cough, a cold.

Q. Ether pneumonia?

A. But he didn't have ether. You were asking for the possibilities.

Q. Do you think, Doctor, that the snoring was sufficient to cause a breaking of a thrombus?

A. His snoring was so severe, well, he would hold his breath and then he would jerk when he would take in his breath [29] he would draw this phlegm into his throat.

Q. Doctor, where would this break loose—this thrombus?

A. Wherever the embolism was formed.

Q. Where was this embolism?

A. In the veins of the pelvis, was likely leading from the pelvis circulation.

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction. He had this thrombus, it happens in lots of people.

Q. Do you think it could have broken loose after four years?

A. It is entirely possible.

Q. Was it possible to arise in the calf of his leg?

A. He didn't have anything in the calf.

Q. Where do they arise generally?

A. In a branch of the Illiac venis.

(Testimony of Dr. O. F. Call.)

Q. Counsel questioned you quite a little about immobilization, do I understand you are of the opinion that immobilization cannot, or could not cause pulmonary embolism?

A. Immobilization does not cause embolism. Mobilization causes embolism.

Q. Why do people have phlebitis?

A. That is not embolism.

Q. What was that, Doctor?

A. That is not embolism, you are thinking of thrombosis of the vein. [30]

Q. The difference between thrombosis and embolism is, one stays in the vein and the other floats?

A. A small portion breaks loose.

Q. Then you call it an embolus?

A. Yes, that's right.

Q. Embolism arises from any kind of immobilization—or mobilization, you said, Doctor?

A. Where there is a predisposing cause.

Q. Does immobilization cause stagnation of the blood in the veins?

A. It does.

Q. And stagnation predisposes embolism?

A. Predisposes thrombosis.

Q. And then it breaks off because of some acute action?

A. That is mobilization.

Q. Acute or undue action?

A. Yes, sir.

Q. Do thrombosis or thrombus come in due course of treatment without surgery?



(Testimony of Dr. O. F. Call.)

A. Yes, sir, typhoid produces thrombosis, varicose veins, injury, external violence, all produce thrombosis.

Q. Do I understand that you have had only three post-surgical deaths in your practice?

A. If you do you are wrong. I said three pulmonary embolism deaths.

Q. How many post-surgical deaths? [31]

A. I cannot answer that at this time but three pulmonary embolism, post-surgical deaths.

Q. When you commence surgical procedure you are fully aware that you can expect pulmonary embolism?

A. We know it is possible but we don't expect it.

Q. It is foreseeable in any case?

A. It is not foreseeable. If it was we would not be operating like we do.

Q. Do you have to take safeguards?

A. Yes, sir.

Q. Then if it is not, and was not foreseeable, why do you take safeguards?

A. It is a possibility but it is not foreseeable.

Q. It is foreseeable in the sense that it might happen?

A. It is a possibility but it is not foreseeable.

Q. Perhaps we are playing on words, Doctor. When you start surgery is it something that might happen in every case?

A. You think of it. It might happen.

Q. Isn't it a fact that the majority of surgical



(Testimony of Dr. O. F. Call.)

cases—strike that—isn't it a fact, Doctor, that the majority of surgical deaths are due to embolism?

A. No, sir.

Q. Have you ever read Cecil on medicine?

A. Yes, sir.

Q. Is it a standard work?

A. Yes, sir. [32]

Q. Is it a standard work?                      A. Yes, sir.

Q. If he said the majority of post-operative deaths are due to pulmonary embolism in hernia cases, would you agree with that?

A. It would be one man's opinion.

Q. Is the Journal of the American Medical Association a reputable publication?

A. Yes, sir, it is.

Q. Do you know Doctor Barnes of the Mayo Clinic?

A. I know of him indirectly.

Q. Would you say this was a correct statement in an article in the Journal of the American Medical Association by Doctor Barnes: "If such a percentage of deaths from pulmonary embolism is applicable to the general population and the ratio remains the same in succeeding years, it may be assumed that three million, sixty-eight thousand people now living in this country will die eventually of pulmonary embolism."?

A. That does not refer to surgical pulmonary embolism.

Q. Pulmonary embolism of all kinds?

(Testimony of Dr. O. F. Call.)

A. Yes.

Q. Now, Doctor, pulmonary embolism can come from immobilization?

A. Pulmonary embolism can come from having a baby, from typhoid, from scarlet fever and many other causes. [33]

Q. Would you call a person dying from pulmonary embolism at childbirth an accidental death?

A. I don't know whether I would or not.

Q. Is it reasonably foreseeable in every childbirth?

A. It is not foreseeable, it might be thought of.

Q. You take it rather lightly in case of childbirth?

A. You might think about it. You can't say that it is foreseeable. It must be so you can see it in order to say it is foreseeable.

Q. Well, it is something you can anticipate?

A. It is something you can think of.

Q. It is a hazard in operations—it is a risk?

A. Yes, it is a risk.

Q. That is true in hernia operations?

A. That is true in any operation.

Q. Isn't it true that the rate of death from pulmonary embolism is five times as high from inguinal or femoral hernia operations than it was from acute appendicitis operations, excluding peritonitis or cases with ruptured appendix?

Mr. Davis: Objected to as immaterial.

The Court: He may answer.

A. My opinion on that would be based upon sta-

(Testimony of Dr. O. F. Call.)

tistics taken from other men against this man's statistics.

Q. You would have no personal knowledge on that? A. No. [34]

Q. Isn't it a fact that the reason—if it is a fact, Doctor, that there are five times as many post operative deaths following hernia operations than following appendix operations, is due to the fact that hernia occurs later in life, and repairs to hernia are made later in life than appendectomies?

A. That is not my opinion that it is always the case.

Q. Do you think Doctor, a man sixty-one is more pre-disposed to embolism than a much younger man? A. Sure, that is true.

Q. Mr. Wilson was more pre-disposed than a younger man—now Doctor, getting to the question of accident, let me ask you this, take the case of post-operative pneumonia is that an accident?

A. You mentioned before either pneumonia, there is that and the person who has respiratory trouble.

Q. With that person it would not be post-operative? A. No, sir.

Q. In case of death due to post-operative shock, would you call that accidental?

A. No, I don't think so, that was due to a physical condition.

Q. Doctor, do you think in this case that this

(Testimony of Dr. O. F. Call.)

man had thrombosis?           A. I think so.

Q. That was a pre-existing condition?

A. I think so. [35]

Q. Therefore it wasn't an accident?

A. It was accidental.

Q. But the pre-existing condition in the pneumonia and shock case was not accidental?

A. They are not comparable, no, they are not comparable to embolism.

Q. It was a pre-existing condition and surgery caused his death in the one case; here you say there is a pre-existing condition which caused his death because of embolism?

A. One is pneumonia from an existing condition, a respiratory condition and then there would be the other condition that also existed——

Q. Just a moment Doctor, let's take the other case, where the shock was not observed, would that be an accident?

A. That is not always an accident.

Q. Post operative shock?

A. Post operative shock, that is a condition due to the fact that the patient's condition was such that he couldn't stand surgery.

Q. Is that accidental?

A. That is incident to the operation.

Q. In all cases of surgery these various things being rare, are nothing but natural consequences in a certain number of cases?

A. You may say they are things to be expected in a certain number of cases. [36]

Q. They follow in a certain number of cases as a natural consequence?

A. They are not natural.

Q. When you operated for the repair of the hernia—strike that—when you operate for the repair of any hernia and there is a pre-existing condition in the venous system that results in death, are those things a natural chain of events, when you start to repair that hernia, due to the condition existing when you start your operative procedure?

A. Referring now to the case of the embolism.

Q. I am taking that assumption.

A. Then in that case the pulmonary embolism would be from violent exercise or exertion coming from something after the operation.

Q. Which would be incident to the operation?

A. Following the operation.

Q. And incident to the operation?

A. Well, like a man being killed in a car accident, it is incident to riding in the car.

Q. Those things you recited followed through to the death?

A. That is right.

Q. If you hadn't started to repair the hernia would the man have died?

A. The man could have been walking down the street and be seized with a coughing spell and with the coughing and expectoration have died of an embolism. [37]

Q. In this case if you immobilized him without surgery and had not started to repair this hernia would he have died?



(Testimony of Dr. O. F. Call.)

A. Immobilization does not produce embolism.

Q. Then it was your repairing of the hernia which, through a chain of events all resulted in his death?

A. It is incident to it.

Q. Are you of the opinion that the condition of the venous system is a disease entity?

A. It may be a disease entity or not.

Q. The condition of the venous system is a co-existing condition with surgery, depending on that condition you have certain natural results, is that so Doctor?

A. If you have a diseased venous system you can expect untoward results.

Q. Any condition of this system which affects a person following surgery, is a co-incident condition following surgery, is that not true?

A. That's right.

Q. Are you of the opinion that there are potential blood clotters as well as bleeders?

A. Yes.

Q. What test did you make for the clotting index?

A. The clotting time and bleeding time.

Q. Will you show that on the hospital chart?

A. I am not sure it is there, it is done in the laboratory and [38] I am not sure whether it is here or not. It is not always done. There is a laboratory report here and it shows the R B C or red blood count 4,300,000 W B C, white blood count 7500 H B 15.2, that is hemoglobin, there is other information on this chart but it does not show



(Testimony of Dr. O. F. Call.)

clotting time, all the information shows a normal condition. It does not, however, show any report of clotting time.

Q. So that there might have been a condition in the venous system or the clotting potential that may have contributed to this embolism?

A. We can prove here that he had a normal blood count, a normal hemoglobin and we don't expect a departure in clotting.

Q. But that is not always true?

A. That's right.

Q. The blood chemistry might have been such that he was a potential clotter?

A. We have no proof either way.

Q. If that was the case it would be a condition that existed?

A. Assuming that he was a potential clotter.

Q. There was no test that we know of to show that he was or not?

A. No test was made.

Q. Is the cough such as mentioned a symptom, or symptomatic of a heart involvement?

A. Not necessarily.

Q. Is it a symptom of heart disease? [39]

A. One of the symptoms.

Q. I may be mistaken Doctor, but did you make the statement that in surgical procedure there was never any reason to expect embolism?

A. I didn't make that statement.

Q. It is still the greatest scourge to surgery?

A. One of the greatest.

Q. Since penicillin and these other drugs, it is

(Testimony of Dr. O. F. Call.)

still the greatest scourge?      A. I think it is.

Q. It always stares you in the face?

A. You are trying to make me say that you expect it, that is not right.

Q. You can anticipate it?

A. No, you cannot anticipate it.

Q. Why are measures taken to avoid embolism?

A. Because of the possibility.

Q. You say "possibility" instead of expectation?

A. No—it is a possibility.

Q. It is a hazard—it is present?

A. It is a possibility.

Q. What measures did you take to avoid it Doctor?      A. What did I take.

Q. Well, what measures do you take?

A. Have the patient moved around.

Q. Pre-operative measures? [40]

A. We look for things that might cause infection, that is one thing—from these examinations we look for anything that may cause any infection and some use anti-clotting substances, Heparin and so forth.

Q. They protect against it by anti-clotting substances and thus reduce the clotting possibility?

A. It is a new thing, done in some clinics.

Q. You didn't do it?

A. I did not. Ninety per cent do not. It is not without danger.

Q. Doctor, is this a correct statement of the distinction in the diagnosis between pulmonary embolism and acute heart failure: At the outset of

(Testimony of Dr. O. F. Call.)

pulmonary embolism—rather, at the onset of a pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first?

Mr. Davis: I will object to that question unless—no, I will withdraw the objection.

Q. What I refer to is the diagnosis of pulmonary embolism and acute heart failure. The only difference is that at the onset of a pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first.

A. The time element in acute heart failure might be the difference, but the color, cyanosis is also present in embolism. [41]

Q. This patient was operated at eight in the morning and at eleven that night he started on the last terminal period? A. No.

Q. You operated at eight or nine in the morning?

A. Yes sir.

Q. And at eleven that night he started on the last terminal period?

A. He certainly did not.

Q. That is your opinion of this hospital chart Doctor? A. That is my opinion.

Q. Doctor Call, commencing about midnight of April 8, at 12:30 it says “respiration very irregular, deep at times then patient seems to cease breathing for a few seconds and cyanosis of lips is obvious.”

A. Yes sir.

(Testimony of Dr. O. F. Call.)

Q. And you think he had started on the terminal period?      A. No, sir.

Q. In this it says——

A. It says there that the pulse is irregular but strong.

Q. At 12:30 the chart shows cyanosis of lips, will you explain what cyanosis is?

A. It means a blue color of the skin, particularly the face due to lack of aeration in the lungs; that can come from holding one's breath. By snoring they stop breathing and also by the swallowing of the tongue, that is what this patient was doing. [42]

Q. Did this patient do that at this time?

A. He was snoring all afternoon and all night. He was snoring at intervals all evening.

Q. You were there two or three times?

A. In the afternoon two or three times and at night again.

Q. Referring to 12:30, do you see any record of snoring when he started to turn blue?

A. He snored long before 12:30. The nurse doesn't chart the snoring at 12:30.

Q. The last time there was a record of it was 11 o'clock?

A. 11 o'clock, pulse good and color good, expectoration of phlegm, respiration irregular but deep.

Q. And at 12:30 respiration very irregular and deep.      A. Yes sir.

Q. How do you account for his turning blue at midnight?

(Testimony of Dr. O. F. Call.)

A. I account for it from the fact that he was snoring whenever he was asleep and holding his breath.

Q. You are speculating on that?

A. It is a circumstance. It is not in the record but the nurse mentioned him snoring when I was there.

Mr. Eberle: I move to strike what the nurse said, if she is available they can get her.

The Court: That portion of the answer may be stricken.

Q. You are of the opinion that the clot broke loose from the [43] pelvic veins?

A. That is the most probable place it would be.

Q. You don't think that clot could have come from the manipulation in the surgical procedure?

A. I don't think so.

Q. This clot might have come from any other portion of the venous system—in the extremities?

A. Particularly from the pelvis, that is the most common.

Q. If he coughed on the street the same thing could have happened?

A. It could have happened, where there is a pre-existing thrombus.

Q. He could have been sitting in an arm chair and coughed and he could have died?

A. Yes, they have been known to die during the process of even giving an enema.

Q. Are those accidents?



(Testimony of Dr. O. F. Call.)

A. That is according to the definition of accident.

Q. That could happen in any case?

A. Sure.

Q. Assuming that a person has been to you for examination or in regard to a heart involvement, and you use the stethoscope, take x-rays of the chest, cardiograms both before and after exercise, taking all the tests you know and you find no pathology and the next day that man died of coronary occlusion or acute heart failure, would you call that an accident? [44]

A. I don't know. It is something that is unexpected. After all these tests it certainly is something that is unexpected.

Q. Then you would say it is accidental?

A. I don't know. I didn't say that.

Q. Isn't it liable to happen?

A. Yes, it is unexpected.

Q. It is something you can anticipate at any time in any person? A. I guess so.

The Court: We will adjourn at this time until 1:30 this afternoon.

1:30 P.M., March 17, 1948

Mr. Eberle: I would like to offer Exhibit 9 at this time, being a photostatic copy of the physician's report.

The Court: If there is no objection it may be admitted.



(Testimony of Dr. O. F. Call.)

DEFENDANT'S EXHIBIT 9

Proofs of Death                      Physician's Statement No. 2

This statement must either be typed or entirely in the handwriting of the physician who should give additional details on the other side of this sheet.

1. What was the deceased's full name? Harry H. Wilson.

2. How long had you known deceased? For 20 years.

3. Where did deceased reside at time of death? Pocatello, Idaho.

4. If you know, state what was deceased's former residence. Pocatello, Idaho.

5. If you know, state what were deceased's several occupations. Merchant.

6. State as accurately as you can the age at death and the following facts in regard to deceased's personal appearance: Age: 61. Height: 5 feet 10 inches. Color hair: Gray. Approximate weight in health: 175 lbs. Color of eyes: Blue.

7. (a) Where did death occur? (a) Pocatello, Idaho, St. Anthony Hospital. (b) What was the date of death? (b) April 8, 1947.

8. How long had you been the medical attendant or adviser of deceased? Fifteen years.

9. (a) For what disease did you treat or advise deceased prior to last illness? Ordinary colds. (b)

(Testimony of Dr. O. F. Call.)

Give date, duration and result of each. (b) Cholecystectomy in 1943.

10. (a) What disease was the immediate cause of death? (a) Pulmonary Embolism. (b) How long, in your opinion, did deceased suffer from this disease? (b) blank. (c) Was death due to an accident? (c) Yes, providing Pulmonary Embolism is classed as an accident. (d) If so, give date and full particulars. (c) blank.

11. (a) From what other important disease, if any, did deceased suffer? No. (b) Give, as nearly as you can, the duration of each one. (b) blank.

12. When were you first consulted by deceased, or by any relative or friend, for the affection which either directly or indirectly caused death? blank.

13. From what date was deceased confined to the house, or prevented from attending to business? April 7, 1947.

14. Was there a coroner's inquest or a post-mortem examination held? State which, by whom, and the result. No.

15. Did any other physicians attend deceased during last illness? If so, give name and address of each. No.

16. (a) Where did you receive your medical education? (a) blank. (b) What is the date of your graduation? (b) blank.

(Testimony of Dr. O. F. Call.)

Dated at Pocatello, Idaho, this 22nd day of April, 1947.

/s/ O. F. CALL,

Post-Office Address: Pocatello, Idaho.

State of Idaho,

County of Bannock—ss.

### OATH

On this 22nd day of April, 1947, personally appeared before me the above-named O. F. Call, who subscribed the foregoing statement before me and made oath that the foregoing answers are each and all true.

[Official Seal] LAURA S. GOUGH,  
Notary Public, Pocatello, Idaho.

This statement must be sworn to before an officer authorized by law to administer oaths. If sworn to before an officer not using an official seal, his authority and the genuineness of his signature must be attested by the proper Clerk under the seal of his office.

(Note Instructions On Reverse Side)

### SPECIAL INSTRUCTIONS

In furnishing this blank the Company does not admit there was any insurance in force on the life in question and expressly reserves all its rights and defenses.

Statement No. 2 should be made by each physician in attendance during the two years preceding death,

(Testimony of Dr. O. F. Call.)

and must either be typed or entirely in their own handwriting. However, when the insurance has been in force for two years or more, and the insured's death occurred at home, only the statement of the physician in immediate attendance at the time of death need be submitted; the Company reserving the right to ask for further proof if necessary.

In answer to Questions 9, 10 and 11, a full statement of each Pathological Process, especially as to its duration and results, should be given.

Where death is the result of Accident or Injury, the word Lesion may be understood to replace the word Disease, in Question 10.

Such indefinite terms as Heart Failure, Exhaustion, and the like, should be avoided, unless full details are added.

Where the spaces provided for the answers are too small, such details as seem desirable should be given below.

This statement must be sworn to before an officer authorized by law to administer oaths. If sworn to before an officer not using an official seal, his authority and the genuineness of his signature must be attested by the proper Clerk under the seal of his office.

When a coroner's inquest has been held, a copy of the verdict, duly certified, must be furnished with this statement.

Every question must be distinctly and fully an-

(Testimony of Dr. O. F. Call.)

swered, and the Company reserves the right to require further information should it be deemed necessary.

The intervention of any third person is not necessary for the collection of an approved claim, and the payment of a commission to any person for services in regard to such claim is unnecessary.

Q. Doctor, when you referred to snoring you referred to heavy breathing where the jaw muscles are relaxed and there is a vibrating of the palate?

A. Yes, breathing through the mouth with the mouth open.

Q. Snoring is a vibrating of the palate?

A. Yes.

Q. That is because of relaxation of the jaw muscles.

A. Yes, sir. [45]

Q. When you give a sedative it relaxes the jaw muscles and the mouth opens, the palate vibrates and that is snoring?

A. In some people.

Q. In this case?

A. This opiate relaxed the body as a whole.

Q. This sedative you gave Mr. Wilson was proper was it?

A. Yes, sir.

Q. As a natural consequence the jaw muscles relaxed?

A. You can say that except in specific cases.

Q. In this case?

A. I assume it did.

Q. His mouth went open and in breathing his palate vibrated?

A. Natural snoring.

(Testimony of Dr. O. F. Call.)

Q. Where there is a sedative or opiate, because of the relaxed condition, secretion runs down the trachea? A. Yes, sir.

Q. That is true in any case where you have a sedative? A. No.

Q. Why?

A. Because a lot of people don't relax the jaw muscles.

Q. Where there is a relaxation it is true?

A. Yes, sir, and it produces snoring.

Q. And labored breathing with the relaxation of the jaw muscles is not uncommon in post operative procedure?

A. In varying degrees. Some will snore and others won't; particularly those who snore anyway, they will snore. [46]

Q. The sedative relaxes the muscles and you have labored breathing because of the sedative?

A. No. The sedative relaxes the body as a whole. In a certain number of people it relaxes enough so that the jaw will drop.

Q. It is not uncommon?

A. It is not very common.

Q. It is a natural consequence of giving sedative in many people? A. A few people.

Q. You only have relaxation and labored breathing in a few people? A. That is right.

Q. It is common in those people under opiates?

A. If you have a person who snores.

Q. Where you have snoring and relaxation after a sedative the secretion flows down the trachea?



(Testimony of Dr. O. F. Call.)

A. Yes, sir.

Q. And a person under opiates makes an effort to clear his throat?

A. Not under opiate, but when he is not under he does.

Q. When he wakes up and finds this mucous in the trachea he tries to clear his throat?

A. Yes, that is natural.

Q. That is natural in the post-operative period?

A. In any case where there is mucous gathering in the throat.

Q. You encourage them to get this mucous up?

A. Yes, sir.

Q. If you don't, what does he get?

A. Metastatic congestion and atelectasis.

Q. So you encourage him to clear his throat?

A. Yes, sir.

Q. That is the normal process?

A. That's right.

Q. Does the vibration of the palate make any difference to the secretion as that got down in the throat if the person snored?

A. I don't see much difference.

Q. So it doesn't make any difference whether he snored or not?

A. Snoring is apt to draw more mucous down.

Q. Would the mere fact that the palate vibrated make any difference in the amount of secretion?

A. That doesn't make secretion?

Q. That makes snoring?

(Testimony of Dr. O. F. Call.)

A. Yes, snoring is a nasal sound.

Q. I thought you said that it was a vibration of the palate? A. That is part of it.

Q. It makes the noise?

A. Only a part of it.

Q. And heavy snoring doesn't make any difference to the amount of mucous going down the trachea? A. That is right. [48]

Q. Following an operation where you give an opiate or sedative there is a relaxation and a normal amount of mucous going down the trachea?

A. That's right.

Q. And the patient is encouraged to cough that up when he wakes up? A. That is right.

Q. When did you first decide that this death was accidental?

A. Shortly after the operation when I was there at five o'clock in the morning.

Q. Handing you Exhibit 9, Doctor, will you give us the date of that?

A. The 22nd of April, 1947.

Q. That was about two weeks after the time you mention?

A. Yes, it was on the 7th he died, no, the 8th.

Q. At that time you were not sure that he died of an accident?

A. I didn't make any mention of accident, I mentioned pulmonary embolism.

Q. The question whether it was an accidental death, what was your answer to that?

A. Yes, providing pulmonary embolism is classed as an accident.

(Testimony of Dr. O. F. Call.)

Mr. Eberle: I believe that is all. I think however, Mr. Merrill has some questions.

The Court: Very well. [49]

Cross Examination

By Mr. Merrill:

Q. Doctor Call, is it your thought that the death of Harry H. Wilson was due to embolism?

A. Due to embolism——

Q. Let me finish the question. Do you think, and is it your thought that the death of Harry H. Wilson was due to embolism independent of all other causes?

Mr. Davis: I don't think that is answerable and I object to it for that reason. It cannot be answered. The question should recite independent of what other causes.

The Court: Of course, the question here is whether the operation was the cause or contributed to or was a contributing cause of the death. The other cause would be immaterial, however, he may answer.

A. An embolism has to have a basic cause for its formation, therefore, the embolism would be the immediate cause of death but it would have to have a basic cause for formation.

Q. Therefore, a death caused by embolism, was not that death caused by that independent of and from all other causes?

A. I cannot answer that yes or no.

(Testimony of Dr. O. F. Call.)

Q. Would there have to be a cause for the embolism?      A. Yes, sir.

Q. You say the immediate death was due to the embolism?      A. Yes, sir. [50]

Q. Doctor, what is herniorrhaphy?

A. Repair of a hernia.

Q. Was this embolism due to a herniorrhaphy?

A. No.

Q. I hand you what has been marked as Defendant's Exhibit 10.

Mr. Davis: I object to the witness being examined on this unless it is shown to him.

Mr. Merrill: Certainly.

Q. Do you recognize that?

A. A certificate of death.

Q. Did you prepare it?      A. Yes, sir.

Q. And certified to it?      A. Yes, sir.

Q. That is a certified copy of the death certificate of the death of Harry H. Wilson?

A. I assume it is, it looks like it.

Mr. Merrill: I now offer in evidence the exhibit which is the certificate of death of Harry H. Wilson.

Mr. Davis: This is the certified copy you got from the bureau of vital statistics?

Mr. Merrill: Yes.

Mr. Davis: No objection.

The Court: Admitted. [51]

(Testimony of Dr. O. F. Call.)

DEFENDANT'S EXHIBIT 10

Certificate of Death

State of Idaho

April 22, 1947

United States

Department of Commerce

Bureau of the Census

State File No. 153025

Local Reg. No. 16

Reg. Dist. No. 510

1. Place of Death:

(a) County: Bannock

(b) City or town: Pocatello

(c) Street Address: No. 7th Ave.

(d) Death Occurred Inside? ☒ Outside? ☐ . . . .  
city or town.

(e) Died in a Home. . . . Hospital ☒ Institution  
. . . . Other place. . . .

(f) Name Hosp. or Inst.: St. Anthony. Stayed:  
1 day.

(g) Lived in this county: 36 years . . . . months  
. . . . days.

Note: For a person residing in this county less than  
1 year, give former residence under item 2.

2. Usual Residence of Deceased: (Always fill in  
these)

(Testimony of Dr. O. F. Call.)

Immediate Cause of Death: Pulmonary Embolism. Duration: Sudden.

Due to: Herniorrophy. Duration 4 hours.

23. Attendant's Own Signature: /s/ O. F. Call.  
and Address: Pocatello, Idaho. Date: 4/10 1947.

(For additional space, use reverse side)

State of Idaho,  
County of Ada—ss.

This Is to Certify That this is a photostatic copy of a certificate filed in the Idaho Department of Public Health under Title 38, Idaho Code Annotated.

Date Issued March 11, 1948.

/s/ JOHN W. WRIGHT,  
Director of Vital Statistics.

Q. In answer to the question "immediate cause of death" you write "pulmonary embolism" and under "duration" you write "sudden"?

A. Yes, sir.

Q. And in answer to the question "due to" you say: "herniorrhaphy" and under "duration" again you write "24 hours"?

A. Yes, sir. May I qualify that statement? In all death certificates it is required that we give the cause of death and anything that had anything to do with it, and any connection. There could have been three or four causes contributing to the immediate cause of death, herniorrhaphy could only be a contributing cause.



(Testimony of Dr. O. F. Call.)

Q. What did you mean when you answered the question "due to," by using "herniorrhaphy"?

A. I meant it followed the herniorrhaphy.

Q. At the time you made this certificate you felt that the herniorrhaphy or the hernia operation did have some effect upon the embolism, that the embolism was caused from the operation?

A. As a contributing cause.

Q. You admit that the hernia operation was a contributing cause?

A. A contributing cause, yes, we will have to admit that.

Q. Harry H. Wilson had a hernia—withdraw that—Harry H. Wilson was operated on for hernia because, of course, there was some need for it? [52]

A. That's right.

Q. Twenty-four hours after, or about that time, following the operation he had what you call an embolism, pulmonary embolism?

A. Not what I call it; he had a pulmonary embolism.

Q. What you have termed a pulmonary embolism?      A. Yes, sir.

Q. That pulmonary embolism was a contributing cause, or—no, strike that please—Doctor, that pulmonary embolism was contributed to by the operation?      A. As a secondary cause.

Q. A contributing cause?      A. Contributing.

Q. What could have been the primary cause if the hernia was the contributing cause?

(Testimony of Dr. O. F. Call.)

A. Primarily it was due to the fact that there was a thrombus in the venous system.

Q. How do you know that?

A. From post mortems in thousands of cases.

Q. You said that you would not be sure without a post mortem?

A. I testified that I could not be sure without a post mortem, yes, sir, you are right.

Q. You cannot say positively that he died from an embolism?

A. From circumstances, evidence and history of the case only.

Q. You have no evidence that this clot came from any source [53] other than the hernia operation?

A. I cannot answer that yes or no.

Q. Do you have any evidence whatever that if he died from pulmonary embolism, that embolism came from any other source than this operation?

A. Yes, sir.

Q. What evidence do you have?

A. The evidence is what you would call circumstantial evidence.

Q. When did you come to the conclusion that he died from snoring, Doctor?

A. We came to the conclusion that he died from pulmonary embolism immediately after his death. We search our records before we make a decision; we try to explain it on a basis of existing facts. It is true in any case of death if it is not from external causes that you have to have a post mortem in order

(Testimony of Dr. O. F. Call.)

to make a positive statement but we do have enough evidence to make it relatively sure. We came to this conclusion after an examination of the case and an examination of the records of the case.

Q. What records?

A. The hospital and operative record.

Q. That is introduced in evidence?

A. Yes. That a herniorrhaphy was performed could be a contributing cause but twenty-four hours after the operation is too soon to have the embolism in the region of the hernia because of that operation. [54]

Q. If you thought it was done by snoring why didn't you put it on the death certificate?

A. No place for it.

Q. What does the next sentence mean?

A. The same—herniorrhaphy.

Q. What was the herniorrhaphy due to?

A. Due to the operation at Mayo's.

Q. It all comes to this: If Harry H. Wilson had no hernia he would not have had an operation?

A. Sure.

Q. If he had no operation he would have had no herniorrhaphy?      A. That's right.

Q. If he hadn't had the herniorrhaphy he would have had not embolism?

A. We don't know that.

Q. If there had been no operation there would have been no death?

A. We don't know that.

(Testimony of Dr. O. F. Call.)

Q. It is probable that his death was due to the fact that he was operated on?

A. A contributing cause.

Q. You are sure of that? A. Yes, sir.

Q. That it was a contributing cause?

A. That's right.

Q. No doubt about that? [55] A. No.

Q. You would not say that if there had been no operation that Harry H. Wilson would have died on the 8th of April at 5 o'clock in the morning?

A. That's right.

Q. So it was the operation that set in motion that which ended in his death?

A. Fundamentally, yes.

Q. And that was for the hernia? A. Yes.

Q. If this breathing or this snoring had anything to do with it, the operation was necessarily the inciting cause was it not? A. Yes.

Q. You would not have expected him to have died from snoring or breathing or anything it produced without the operation?

A. I don't think we would.

Q. And the operation was for hernia?

A. That's right.

Q. You stated that he was operated on twice?

A. That is right.

Q. Once for a bowel obstruction?

A. That is right.

Q. The second time was for hernia?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. And this was the second hernia operation?

A. That is right.

Q. If there was any clot that resulted in the embolism, it was certainly due from some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation?

A. Yes, sir.

Q. It was what we would term a bodily infirmity?

A. That's right.

Q. If he had no bodily infirmity there could not have been an embolism?

A. That is pretty broad. There are embolisms that form without bodily infirmities.

Q. This was not such?

A. This was bodily infirmity.

Q. Whether you say it came from the operation performed on April 7, or whether it came from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Davis:

Q. You were asked: "you would not have expected the patient to die without any operation" and you answer that "no"? [57]

A. That's right, I would not expect him to die.

(Testimony of Dr. O. F. Call.)

Q. Now, Doctor, you wouldn't and didn't expect him to die with the operation, did you?

A. No, I did not.

Q. There wasn't anything in the operation or preceding the operation that led you to think the man might die?

A. That is right, there was not.

Q. When you speak of contributing cause, you are answering that generally and not with reference to your diagnosis of this particular case or this particular death?

A. That is right.

Q. You are still of the same opinion that you were on direct examination that the cause of this man's death and the cause of this embolism was the violent, unusual and extraordinary coughing and snoring. That in your opinion was likely to cause this embolism to break loose?

Mr. Merrill: Objected to as an improper question.

The Court: He is qualified here as an expert, he may answer.

A. The cause of the death was acute embolism, pulmonary embolism which was caused by violent action to break the embolism from the thrombosis.

Q. Was there anything indicated to you at the time you operated or gave him the sedative that caused you to believe that he would develop this extraordinary condition of snoring [58] or breathing or holding his breath?

Mr. Merrill: Objected to, there is no testimony



(Testimony of Dr. O. F. Call.)

to support this type of question.

The Court: I will permit him to answer.

A. No.

Q. Doctor Call, with reference to your experience in operations, was or was not the condition that existed there or the condition that developed with reference to the snoring, choking and the stopping of breathing a most extraordinary condition?

A. It was.

Q. And was it to be expected? A. No, sir.

Q. It was not to be expected that it would develop? A. No, it was not.

Q. Was it an unforeseen occurrence?

Mr. Merrill: Objected to as repetition.

The Court: He may answer.

Q. I call your attention to the definition in Webster's International Dictionary of accident; that defines an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden and unexpected event; chance; contingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." [59] Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation? A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance? A. It was.

(Testimony of Dr. O. F. Call.)

Q. Due to contingency? A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty? A. It was.

Q. Was it a mishap? A. It was.

Q. Did he die in your opinion, by accident?

A. He did.

Q. Now with reference to this condition, this unexpected condition that occurred there with reference to the choking and the snoring, was that an event that took place without foresight and expectation? A. That's right.

Q. Was it undesigned? A. It was. [60]

Q. Was it a chance? A. It was.

Q. A contingency? A. Yes, sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes, sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes, sir.

Mr. Merrill: Objected to as leading.

The Court: He has answered and the answer may stand.

Q. Now, Doctor Call, you testified that there was a possibility in every case that a person might die.

(Testimony of Dr. O. F. Call.)

Do you understand that possibility comes within the definition of accident?

Mr. Merrill: I object to that it is beyond the opinion or conclusion of an expert.

The Court: I would like to have the doctor reconcile this answer, or rather the answer to the question previously asked with the answer to Mr. Merrill's question. He answered Mr. Merrill's question that it was [61] a contributing cause of death.

A. We always have a contributing cause.

The Court: Regardless of any death certificate, doctor, you answered Mr. Merrill's question in which you said that the operation was the contributing cause of his death. Now, you may reconcile that answer with the answer to Mr. Davis that this was an accident within the definition given in the dictionary.

A. I think maybe I could do better if I may use an illustration?

The Court: Certainly, that is all right.

A. If you were riding in a car and the car was being driven over a road where there was a large chuck-hole unforeseen by the driver—the driver hits the chuck-hole and throws the car over and one is killed, the driving of the car is the contributing cause, just as the hernia is the contributing cause here.

Q. How would the hernia be the contributing cause?

A. Well, you might say, it takes the patient away from his normal way of living.

(Testimony of Dr. O. F. Call.)

Q. It is your opinion that the man would not have died without an operation for hernia?

A. That is right.

Q. And with reference to driving the car and hitting the chuck-hole, the snoring and breathing is that comparable to the chuck-hole? [62]

A. That's right.

Q. Then you testify that if the man had not had the hernia this choking would not have occurred and that the hernia is not the cause, or did not cause death?

Mr. Merrill: Objected to as argumentative and leading.

The Court: It is, but that is the question we are trying to get at here.

A. In putting that question to me, the answer is again, that the snoring is comparable to the chuck-hole in the road.

Q. Dr. Call, you have made answers here that would indicate, if you understood the way counsel was asking the question, that the hernia operation caused the death. Now, as I understand it, the fact that he was there—is that what you meant doctor, the fact that he was in the hospital for an operation put him in the position for the other thing to happen and that the other thing caused his death?

A. That's right.

Q. And that is your studied opinion?

A. Yes, sir.

Q. Any man in this court room may die before he gets to the foot of the stairs?

(Testimony of Dr. O. F. Call.)

Mr. Merrill: Objected to as immaterial.

Mr. Davis: This was all gone into on cross. [63]

The Court: He may answer.

A. Certainly.

Q. But it would certainly be a calamity?

A. Yes, and unexpected.

Mr. Davis: That is all, Doctor.

### Recross-Examination

By Mr. Merrill:

Q. If the snoring was the chuck-hole, as you say, and the immediate cause of death was——

A. I said it was the chuck-hole that caused the embolism, the snoring was comparable to the chuck-hole in the road that caused the car to turn over.

Q. It all comes back to the operation?

A. That is comparable to the car in which he was riding.

Q. It was the commencement—the thing that set in motion everything that resulted in the death? The cause of the death?

A. The operation could be the second thing?

Q. The operation was the contributing cause of the death? A. Yes.

Q. And it was due to hernia? A. Yes, sir.

Q. The hernia was the contributing cause of death? A. That's right.

Q. There is no accidental means involved? [64]

A. We didn't expect this coughing and snoring.

Q. There was no accidental means involved?

(Testimony of Dr. O. F. Call.)

A. No external violence.

Mr. Merrill. That is all.

### Recross-Examination

By Mr. Eberle:

Q. Dr. Call, I am not clear on this. Did you reason that the snoring was the cause of the breathing of the thrombus and the cause of the embolus getting into the blood stream?

A. The violent action of the snoring broke the embolism from the thrombus, or thrombosis.

Q. If I snore I may break a thrombosis loose and cause an embolism?

A. I am testifying about this case Mr. Eberle.

Q. Just the snoring broke loose the embolus?

A. I didn't say the snoring, but the snoring and the violent action.

Q. The snoring and coughing?

A. The violent action.

Q. Did the snoring break loose the embolism?

A. I didn't so testify.

Q. But is it your testimony that the snoring and coughing did?

A. The snoring, coughing and the violent action.

Q. What would snoring have to do with the breaking loose of a thrombus in the pelvic region?

A. The snoring produced a lot of mucous in the respiratory tract that dropped into the throat; this made him struggle and the struggling would break it loose.



(Testimony of Dr. O. F. Call.)

Q. It was coughing and struggling; I thought you testified that snoring was a vibration of the palate?

A. That is what you said.

Q. What did you say?

A. It was a form of breathing associated with the vibrating of the palate.

Q. How does it differ from labored breathing?

A. It relaxes and drops down and shuts off the breath.

Q. What shuts off the breath, doctor?

A. The tongue, and the secretion dropping into the throat.

Q. That is due to the sedative given the patient?

A. No, sir, not the sedative.

Q. The relaxation of the muscles causes the tongue to drop back?

A. Yes, and the violent catching of his breath again forces it back to the normal position.

Q. The mucous and secretion that get down in the trachea due to the relaxation from the opiate?

A. Not that—it was mucous in the respiratory tract.

Q. Yes, and you clear that out—naturally you clear your throat when that gets down in the throat?

A. If you are not asleep?

Q. When you are asleep the natural tendency is to drain down? [66]

A. The tendency is the same whether he is given an opiate or not. A snorer does the same thing without an opiate.

(Testimony of Dr. O. F. Call.)

Q. In ordinary life he would do it without an opiate? A. That's right.

Q. His action during this operation and subsequent was not different than in ordinary life?

A. That is correct.

Q. This could have happened in bed any night?

A. Or walking down the street.

Q. It was in no way due to the fact that he was in the hospital?

A. He was quite a snorer in an operation or not in an operation.

Q. His cough and snoring was no different?

A. No different except his condition was weakened by reason of his being a sick man.

Q. Then you think this happened because of his weakened condition? A. Sure.

Q. So after all, doctor, the contributing cause was by reason of the weakened condition or bodily infirmity, by reason of his condition at that time?

A. That's right.

Q. Now, we have two bodily infirmities that he had. Thrombosis formed about four years prior when he had the original hernia operation and his condition——

A. He had another operation also. [67]

Q. But it was an operation for hernia he had some four years ago, wasn't it?

A. Yes, sir.

Q. At that time there was a bodily infirmity in the way of a thrombosis? A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. And it was because of his coughing that the thrombus was broken loose and went into the blood stream? A. Yes, sir.

Mr. Eberle: I think that's all.

Mr. Merrill: Nothing further.

Mr. Davis: That's all, doctor. I will call Dr. Brothers.

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### W. W. BROTHERS

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Davis:

Q. What is your profession? A. Surgeon.

Q. How long have you lived in Pocatello, doctor?

A. Since 1919.

Q. How long have you specialized in surgery?

A. I was certified as a specialist in 1926 by the American College of Surgeons. [68]

Q. You are a member of the College of Surgeons? A. Yes, sir.

Q. And have done post graduate work in surgery from time to time? A. Yes, sir.

Q. You were an officer in the first World War?

A. Yes, sir.

Q. Did you do surgery extensively then?

A. Yes, sir.

Q. You were in the last World War?

A. Yes, sir.

(Testimony of Dr. W. W. Brothers.)

Q. Your rank at discharge was what?

A. Colonel.

Q. Were you in that war in the capacity as a doctor from the commencement to the close of the war?

A. Yes, sir.

Q. Were you in charge of any Government Hospital?

A. Yes, I was.

Q. Whereabouts?

A. In charge of all medical installation at Headquarters in Algiers, AFHQ, also in charge of medical and surgical installation at Supreme Headquarters in London and Paris and Frankfort.

Q. Did you do surgery there?

A. Very little. [69]

Q. Was it done under your supervision?

A. Yes, it was.

Q. How extensive was that?

A. Most of it was referred, we didn't do a lot at headquarters.

Q. You were consulted in those matters all of the time?

A. Yes, sir.

Q. You are a graduate of a recognized medical school?

A. Yes, Northwestern University.

Q. Did you know Harry H. Wilson, personally?

A. Yes, sir.

Q. Were you at any time his family physician?

A. I took care of Harry a time or two, years ago.

Q. You were well acquainted with the family?

A. Yes, sir.

Q. You took care of his children?

(Testimony of Dr. W. W. Brothers.)

A. Yes, sir.

Q. And of Mrs. Wilson? A. Yes, sir.

Q. You were familiar with his physical condition generally? A. Yes, sir.

Q. And his general characteristics? ....

A. Yes, sir.

Q. Could you give us an estimate of how many hernia operations you have performed or assisted in performing?

A. I don't know, I haven't kept any record. I have done a [70] lot of hernias. I did over a hundred the first year in the army in World War I.

Q. Have you done six or seven hundred?

A. At least.

Q. Out of the six or seven hundred, how many post operative deaths from hernia operations by pulmonary embolism have you had? A. None.

Q. How many post operative deaths from any cause after these hernia operations have you had?

A. I have never had a hernia patient die.

Q. I assume in all operations—hernia, pelvic and abdominal operations that you have performed—I suppose you have performed a great many, probably more than a thousand? A. Yes, sir.

Q. How many post operative—in all of those operations have you had pulmonary embolism?

A. I have had one.

Q. What is your opinion as to whether post operative death following operations for hernia where the cause is pulmonary embolism is a rarity?

(Testimony of Dr. W. W. Brothers.)

A. It is very rare.

Q. Would that be unexpected? A. Yes, sir.

Q. Now, Doctor Brothers, you as a surgeon are familiar and [71] from studies you have an opinion as to when post operative deaths, following operations, are most likely to occur from embolisms?

A. How soon following operations are deaths from embolisms likely to occur?

Q. Yes. You have an opinion as to that, do you, doctor?

A. Yes, sir, it is most likely to occur from the second week following the operation to the third week. They occur at a time when the patient is thought to be practically well, or well on the road to recovery.

Q. Have you carefully studied the hospital chart and the bedside notes marked Exhibit 7 in this case?

A. Yes, sir.

Q. That is the history and record of Harry H. Wilson? A. Yes, sir.

Q. Have you read the deposition of Doctor Beeson, Doctor Swindell, Doctor Pittenger and Doctor Stewart? A. Yes, sir.

Q. Have you familiarized yourself as much as possible with the record and the testimony that is available concerning Mr. Harry H. Wilson, now deceased? A. I have.

Q. Do you have an opinion as to the cause of his death? A. I have.

Q. What is that opinion? [72]



(Testimony of Dr. W. W. Brothers.)

A. I think he died of pulmonary embolism.

Q. In your opinion, from the record, and I think you heard the testimony of Doctor Call?

A. Yes, I did hear it.

Q. From the record and that testimony was that pulmonary embolism an event that took place without foresight and expectation?

A. Yes, sir.

Q. Was it an undesigned, sudden and unexpected event?           A. Yes, sir.

Q. And was it by chance?           A. Yes, sir.

Q. Was it an undesigned and unforeseen occurrence of an afflictive and unfortunate character?

A. Yes, sir.

Q. Was it a casualty?           A. Yes, sir.

Q. Was it a mishap?           A. Yes, sir.

Q. Now, Doctor, in your study of the history of this case is there anything to indicate that this man had any profound shock after the operation, before his death?           A. No, sir.

Q. What do you say as to whether he had any shock at all?

A. According to the record there was no evidence of surgical shock. [73]

Q. Why do you say that?

A. The nurse's notes chart the patient's pulse at regular intervals and his pulse did not exceed 72 at any time after the operation.

Q. If he was suffering shock after the operation what would his pulse be?

(Testimony of Dr. W. W. Brothers.)

A. Rapid, feeble pulse. Very rapid, a hundred and over, on up to where they cannot count it.

Q. Now, Doctor Brothers, what in your opinion caused this pulmonary embolism and why do you say it was accidental?

A. The exciting cause of the pulmonary embolism in my opinion was the exertion of his unusual type of snoring and coughing that is the exciting cause. The remote cause is, of course, a thrombus. There has to be thrombosis of some foreign material to produce embolism.

Q. Anything in the blood stream that is caused to move by coughing or anything else would cause pulmonary embolism?      A. Yes, sir.

Q. Is there anything in your opinion, basing it on your long experience, that would have indicated or caused a surgeon to expect this violent or extraordinary type of snoring and this exertion?

A. No.

Q. Was it unexpected?      A. Yes, sir. [74]

Q. What is your opinion Doctor, as to whether pulmonary embolism—strike that please,—In your opinion is there any substantial difference in the symptomatology of pulmonary embolism and thrombus?      A. Yes, sir.

Q. What is the difference?

A. They are different conditions. Thrombosis may exist without symptoms, entirely without symptoms, pulmonary embolism is very dramatic, a sudden thing, and causes death in a very few minutes if it is a large embolus.

(Testimony of Dr. W. W. Brothers.)

Q. With reference to the percentage of deaths that follow hernia as post operative deaths, what is your opinion as to whether that is high or a very low percentage?

A. In my opinion it is very low. In my personal experience I never had one. I never saw any of my associates have one.

Q. You heard my question of Doctor Call from this Text Book by TeLinde?           A. Yes, sir.

Q. Is that a recognized work?

A. Yes, sir.

Q. It is prepared by a Doctor who was taking his record, or making his record from the results at Johns Hopkins and Mayo Clinics?

A. Yes, sir.

Q. Now, Doctor, I call your attention to a statement on [75] 87 as follows: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery." Do you agree with that?

A. Yes, I do.

Q. The accident may occur in surgery without being the result, let me put it this way. The accident may occur in surgery without surgery being the cause of the accident?

A. Yes sir, that is right.

Q. Referring to post operative deaths. The accident after surgery doesn't mean that surgery is the exciting cause of that death, or that surgery caused the death at all?           A. No, sir.

Q. There can be accidents in surgery?

(Testimony of Dr. W. W. Brothers.)

A. (By Mr. Merrill): We object to that as argumentative, leading and suggestive.

The Court: The rule is that a pretty broad scope is allowed where you are examining an expert as this witness is. You may continue with the question.

Q. There is an occasional accident in surgery the same as there may be an accident in anything else? A. Yes, sir.

Q. The accident would not have to be caused by the surgery at all, would it Doctor?

A. No, sir. [76]

Mr. Merrill: Move to strike the answer for an objection.

The Court: It may be stricken for the purpose of the objection.

Mr. Merrill: Objected to as leading.

The Court: Overruled, the answer may be reinstated.

Q. That, as I understand it, in your opinion, is what happened. There was an accident not connected with the surgery? A. That's right.

Q. It is your opinion that surgery was not the contributing cause to the pulmonary embolism at all?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is right.

Q. (By The Court): I think that question was a bit leading Mr. Merrill, but this is an expert and

(Testimony of Dr. W. W. Brothers.)

it is tried before the Court. The answer may stand.

Mr. Davis: That is all Doctor.

The Court: We will recess for ten minutes.

3:45 P.M. March 17, 1948

Mr. Davis: I wonder if I may ask another question or two.

The Court: Yes, you may.

Q. It was your opinion based on the facts produced here which [77] facts are available to you in this matter,—May that be stricken please,—

Q. Doctor Brothers, will you give us your opinion based upon the facts as produced here, which are available to you in this matter, as to whether or not this death would have been likely to occur under the same conditions, of extra-ordinary snoring and coughing, regardless of whether the operation had been performed or not?

Mr. Merrill: Objected to as not proper, there is no foundation and it calls for a conclusion and therefore it is incompetent.

The Court: He may answer.

A. Yes sir, I think he probably would have died just the same whether he would have been operated on at all.

Q. In your opinion it would have been an accident as it has been defined here? A. Yes, sir.

Mr. Davis: That is all, you may examine.

(Testimony of Dr. W. W. Brothers.)

Cross-Examination

By Mr. Eberle:

Q. With reference to the testimony as to an accident. Is death an accident?

A. It is not so defined, always.

Q. In your opinion is death an accident?

A. Sometimes. [78]

Q. Is it an accident when it is dramatic?

A. That is part of the definition of accident, a dramatic occurrence.

Q. Not every dramatic death is an accident, is that correct?      A. I would not think so.

Q. Suppose that Mr. Wilson went home to dinner and sat down, cleared his throat and had an embolism and died, would that be an accident?

A. I think so.

Q. If a person dies while sitting in a chair, of embolism, is that an accident?      A. I think so.

Q. Is post-operative pneumonia an accident?

A. Not ordinarily, no.

Q. Is post-operative shock an accident?

A. I don't think so.

Q. It would be dramatic?      A. Yes, sir.

Q. It would be sudden?

A. Not as sudden as embolism.

Q. Pretty sudden?

A. Rather a short time.

Q. Would it be undesigned?

A. Without design, I think so.

Q. But still not an accident?



(Testimony of Dr. W. W. Brothers.)

A. No. [79]

Q. Would it be expected?

A. You would have more warning, depending on the type of operation, you might expect shock.

Q. What percentage of post operative deaths are due to shock?      A. I don't know.

Q. Is it rare?      A. Rather rare.

Q. It is rather rare if you die from post-operative shock and if you die from pulmonary embolism?      A. Yes, sir.

Q. What is the distinction?

A. Well, embolism is the breaking off of a clot which is caused by unusual exertion. The breaking off of this clot causes the fragment or broken portion to float through the blood stream; that happens as the result of unusual exertion. Exertion is the exciting cause.

Q. If I walk down the street and create an embolism and I die, that is an accident?

A. Yes, sir.

Q. That is your opinion of an accident?

A. Yes, sir.

Q. Is that expected Doctor?      A. No, sir.

Q. And shock is not expected?

A. You might expect shock if you had a severe blood loss [80] or a severe operation.

Q. In as much as recent years have produced penicillin and other drugs, what is the greatest single factor that a surgeon has to face with regard to post-operative deaths?

(Testimony of Dr. W. W. Brothers.)

A. I think shock is one of the greatest.

Q. Not embolism?

A. It does not occur to me that it is that common.

Q. Do you belong to the American College of Surgeons?      A. Yes, sir.

Q. And would you report that as a rare case to the College of American Surgeons?

A. No, there have been lots of reports.

Q. You would not report it as unusual?

A. I think of it as unusual.

Q. I didn't ask that.

A. No, I wouldn't report it because many have been reported.

Q. You said that in your opinion the cause of death was pulmonary embolism. What records did you use?      A. The hospital records.

Q. From the hospital record introduced in evidence here as exhibit 7 you concluded from that record that the man died from pulmonary embolism?      A. That is right.

Mr. Davis: That is not a question.

The Court: Perhaps not, but the witness answered. It may stand. [81]

Q. Referring to the pulmonary embolism, did you rely on this hospital record?

A. I think there is enough in the record to indicate that it was pulmonary embolism.

Q. You based your opinion on that?

A. Largely.

(Testimony of Dr. W. W. Brothers.)

Q. What are the symptoms of pulmonary embolism?

A. It has very few preliminary symptoms. They die within two to fifteen minutes from the onset of the embolus. They die very suddenly. They have very few symptoms, some pain in the chest. They may cough and suddenly stop breathing.

Q. It is the stopping of respiration and pain in the chest? A. Yes, there is that.

Q. Is there any indication of pain in that record in the last hour or two?

A. There is no mention of pain.

Q. Did you hear Doctor Call testify that he was familiar with the snoring and breathing condition of Mr. Wilson? A. Yes, sir.

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir.

Q. Why did you say it was unexpected if Doctor Call knew in advance that he had this coughing?

A. The Doctor didn't know he had the thrombus.

Q. Why was it unexpected if he knew of the bodily infirmity with reference to the snoring and so forth?

A. If you consider that the exciting cause, he still has to have the thrombus.

Q. Did you hear Doctor Call say he knew he had several operations for hernia prior to this operation? A. I understood he had one.

(Testimony of Dr. W. W. Brothers.)

Q. Does a surgeon know, where there has been an operation, does a surgeon know there might well be thrombosis?

A. Yes, he might think there might be thrombosis, however it might be present without symptoms.

Q. Even if there had been a herniorrhaphy or a herniotomy; you might anticipate there was a thrombus, isn't that right?

A. I don't think so.

Q. You don't think so, what word would you use instead of anticipate?

A. In the absence of symptoms you would not anticipate nor expect a thrombosis.

Q. A surgeon knows where there has been surgical procedure there is a possibility of thrombosis existing?

A. Yes, sir, there is a possibility.

Q. You rather use the word possibility?

A. Yes, that is the word to use.

Q. It is a hazard in every surgical procedure?

A. Yes, sir.

Q. It is a hazard where a surgeon operates the second time?

A. Yes, sir.

Q. He knows of the existence of the hazard?

A. Yes, sir.

Q. Not only did Doctor Call know of the existence of the hazard by reason of the first surgery but also he knew of the snoring and breathing proclivities of this person. He knew of that hazard?

A. I suppose that is true.

(Testimony of Dr. W. W. Brothers.)

Q. Generally, where there is a thrombus from which portions may be broken, quite often the amount of coughing is immaterial, isn't that true?

A. Immaterial in what way.

Q. A rather light cough might break the thrombus loose in one instance, or a heavy cough in another?

A. Yes sir, that is true.

Q. It doesn't always take a heavy cough?

A. It would be more apt to break.

Q. Even though he had a comparatively light cough it might have broken off the embolus?

A. It is possible.

Q. Speaking of accidents again. In your opinion where an operation is skillfully performed and the man dies, is that an accident? [84]

A. It would depend on what caused his death.

Q. You have heard the statement "the operation was a success but the patient died." In this instance where the surgical procedure was proper and no infection occurred and the man dies, is that an accident?

A. If he dies of pulmonary embolism, I would say yes.

Q. Why do you say that is an accident?

A. It is so definitely an accident. It is an unforeseeable, unexpected and tragic death.

Q. Is there any other tragic cause of death?

A. Gunshot wound.

Q. Post operative deaths?

A. I don't think you have any like pulmonary embolism.

(Testimony of Dr. W. W. Brothers.)

Q. Is death by coronary occlusion sudden?

A. Yes, it is sudden.

Q. Is it dramatic? A. Yes, sir.

Q. Is it undesigned?

A. Yes, sir—well, there is a cause for coronary occlusion.

Q. Is it an accident?

A. I would not say so, no I wouldn't think it is an accident excepting when an embolus is concerned, and that is thrombosis.

Q. You think coronary thrombosis is an accident? A. No.

Q. It is dramatic? [85] A. Yes, sir.

Q. Sudden? A. Yes, sir.

Q. Undesigned? A. Yes, sir.

Q. Unexpected?

A. You might expect it if you had a cardiogram.

Q. If the cardiogram showed no pathology—that is possible isn't it Doctor?

A. Yes, it is possible.

Q. Would that be an accident?

A. No, I don't think so.

Q. So thrombosis plugging an artery of the heart with a clot is not an accident, but an embolus coming from the venous system and plugging of a vein of the lung is an accident? A. Yes, sir.

Q. Is a surgeon aware of the danger of an embolism or shock every time he operates?

A. Yes, sir, he is always aware of it.



(Testimony of Dr. W. W. Brothers.)

Q. In every operation?

A. Yes, sir, he is always aware of danger.

Q. You never know whether in a particular case there may be an occlusion or thrombosis—those are dangers that may be present?

A. Yes, but they don't concern you very much because they are very rare. [86]

Q. So rare that you would report it to the American Medical Association if you found one?

A. No, sir.

Q. Have you made any study of the percentage of post operative deaths due to hernia operations?

A. Not hernia alone.

Q. Do you know whether in preparing statistics at Mayo's they have come to the conclusion that there are five times as many pulmonary embolisms following hernia operations as there are in operations for appendicitis?

A. Yes, I know that is a statement they put out.

Q. Where there is a psychological poison due to changes in bodily functions brought about by anesthetic, would you consider that an accident?

A. Psychological.

Q. Yes.

A. I don't understand that, I would rather think you mean pathological.

Q. Would you think that would be accidental?

A. Yes, I would think so.

Q. From the anesthetic?

A. That would not be the normal result.

(Testimony of Dr. W. W. Brothers.)

Q. Doctor, you say in this case the accident was not connected with the surgery?

A. In my opinion it was not.

Q. Do you rule out the embolus from the lower extremities? [87]

A. Most likely place would be in the pelvic veins.

Q. Ordinarily emboli originates in the lower extremities?

A. Most commonly in the illiac and larger veins of the leg and prostate.

Q. There is no reason that it would not originate in there in this case?

A. Except that the original hernia operation might have left a thrombosis.

Q. Yes, except that the original hernia operation may have left a thrombosis?

A. That is right.

Q. As between the two it is pure speculation?

A. That's right, yes, sir.

Q. You stated that you base your opinion upon the theory that the embolus could not be coming from ligation or manipulation because of the short time?

A. That is extremely rare.

Q. But there are cases that arise in that short time.

A. That is extremely rare.

Q. But it is possible?

A. That's right, it is possible.

Q. Does so called snoring increase the secretion that would go down the trachea or does it reduce it?

(Testimony of Dr. W. W. Brothers.)

A. There is somewhat of an irritation by this flapping of the soft palate that might increase the secretion. [88]

Q. It is good procedure to require and to cause the patient to cough up that phlegm?

A. Yes, sir.

Q. Opiates and sedatives are proper procedure?

A. Yes, sir.

Q. They relax an individual, some more and some less? A. Yes, sir.

Q. It is not uncommon that a person may be relaxed a great deal? A. That's right.

Q. The jaw muscles of persons relax and the mouth might drop? A. Might drop open.

Q. And he may be so relaxed that those muscles don't operate? A. Yes, sir.

Q. As a result of the opiate—strike that—as a result of the relaxation following an opiate and the flowing of this secretion from the relaxation, it is proper procedure to require coughing to bring up the secretion? A. That's right.

Q. That cough might be light or heavy?

A. Yes.

Q. It might be light or heavy and still bring on an embolism? A. Yes, sir.

Mr. Eberle: That is all Doctor.

#### Cross-Examination

By Mr. Merrill: [89]

Q. You say that it is extremely rare but possible that pulmonary embolism may come from an

(Testimony of Dr. W. W. Brothers.)

operation within a period of twenty hours, that is the effect of your testimony?      A. Yes, sir.

Q. So it was possible that this pulmonary embolism may have come from this operation?

A. Possible but not probable.

Q. What, aside from the time in the record that would cause you to conclude that it was not probable?      A. Just the time element.

Q. That is all?      A. Yes, sir.

Q. You admit that the time element is long enough for a possible embolism from the operation?

A. Yes, I admit it is possible but not probable.

Q. So therefore you are basing your opinion on probabilities and possibilities rather than any specific facts?

A. I am basing my opinion on the most likely thing that happened.

Q. But you do and you must admit that it is possible that the embolism was the result of the hernia operation, if it was an embolism?

A. I don't think it was due to the hernia operation.

Q. There is a possibility?

A. A bare possibility.

Q. It does occur in that period of time?

A. Very rarely. [90]

Q. You have nothing except your own opinion and the element of time that causes you to conclude that?      A. That is right.

Q. You speak of embolism caused by thrombosis, now, what causes the thrombus?

(Testimony of Dr. W. W. Brothers.)

A. It is caused by different things; prior surgery; injuries; infection of the vessel walls; foreign material in the blood stream; endocarditis.

Q. And everyone of those go back to a bodily infirmity.

A. Injuries and prior operations, you would not call them diseases.

Q. But it is a bodily infirmity?

A. Yes, it is.

Q. The fact that this man had been operated on twice before, that would create a probability for the thrombosis?

A. Yes, sir, I think he had some damage to the circulatory system in the abdomen.

Q. If he had not been operated before you know of nothing that could have created thrombosis in Harry Wilson?

A. Yes, it might occur at anytime from slowness of the blood flowing. He might have thrombosis and not know it.

Q. It would be due to a bodily infirmity?

A. It might be due to the slowness of the blood stream; it would clot.

Q. It would be a bodily infirmity, a strong healthy man would [91] not have thrombosis?

A. Yes, he might.

Q. It would be due to bodily infirmity?

A. If you call stasis an infirmity.

Q. Have you any theory upon which you can base your conclusion as to the origin of this thrombosis?      A. I don't know where it was.

(Testimony of Dr. W. W. Brothers.)

Q. You cannot say that it wasn't connected with this operation? A. I don't think it was.

Q. You have no way of saying that?

A. Yes, this thing occurred too soon following this surgery to have been caused by it.

Q. The element of time is the only thing you have to conclude that? A. Yes, sir.

Q. The thrombosis may have been due to a preceding operation? A. That's right.

Q. You have no means of saying it was?

A. No, sir.

Q. The preceding operation was for hernia?

A. Yes, I understand so.

Q. So hernia may have contributed to this embolus?

A. I think it was the abdominal operation.

Q. It was a hernia operation that preceded this one?

A. It is very apt to occur where you have the operation for the internal obstruction. [92]

Q. Have you examined the record of this operation? A. No, sir.

Q. You have nothing upon which to base your conclusion? It is simply a guess?

A. Nothing only I know he was operated.

Q. Do you mean to say Doctor, that in your opinion Harry Wilson would have died at five o'clock in the morning April 8, 1947 whether there had been any operation or not?

A. He might have.



(Testimony of Dr. W. W. Brothers.)

Q. Is it your opinion that he would?

A. I think he would.

Q. From what do you think he would have died?

A. Embolism.

Q. What would have caused it?

A. Thrombosis.

Q. When did he have thrombosis?

A. I think he had it before this operation.

Q. What evidence do you have for that conclusion?

A. I don't have any except this record.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Davis:

Q. Counsel examined you about post operative deaths, and in his examination indicated that hernia post-operative deaths were not rare and asked you about a statement [93] concerning Mayo's to the effect that there was five time more post-operative deaths following hernia operations than there was following something else. Now, Doctor, would that determine anything unless you know the number of hernia operations?

A. No.

Q. What is the ratio between operations for hernia and appendicitis, is hernia more common?

A. I can't answer that now.

Q. Do you know how many millions of hernia operations are performed?

A. That depends on the type of operation.

Q. And the question of rarity of death follow-

(Testimony of Dr. W. W. Brothers.)

ing those operations would depend, not upon the percentage of some other disease but on the number of hernia cases as a total and the number of deaths, and that would determine the total would it not, that is, it would determine the total percentage?

A. Yes, sir.

Mr. Davis: That is all.

### Recross Examination

By Mr. Eberle:

Q. Post operative pulmonary embolism is more likely to occur in older than in younger aged persons? A. That is right. [94]

Q. You knew that Mr. Wilson was sixty-one?

A. Yes, sir.

Q. He would be more predisposed to it than a man thirty or forty?

A. Yes, sir.

Q. The reason that post operative embolisms are more in hernia cases than in appendectomy cases is because appendectomy occurs earlier in life?

A. That is true.

Mr. Eberle: That is all, Doctor.

Mr. Davis: May the Doctor be excused from further attendance?

The Court: Unless counsel wants him to stay I think the Doctor should be allowed to go.

WALTER M. JONES

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Where do you live, Mr. Jones?

A. Salt Lake City, Utah.

Q. What is your business?

A. Branch manager for the Business Men's Assurance Company for the branch serving the states of Utah and part of Idaho.

Q. And Pocatello is in your jurisdiction? [95]

A. Yes, sir.

Q. Did you know Mr. Wilson personally?

A. I did not.

Q. You knew he had a policy with your company?  
A. Only after his death.

Q. He had only one policy with your company?

A. Yes, as far as I know, that is correct.

Q. You came here in this case as branch manager to represent the Business Men's Assurance Company?

Mr. Merrill: That is objected to as immaterial.

The Court: He may answer.

A. Yes, sir.

Q. Now, Mr. Jones, did you bring with you the records of your company showing the payments of premiums by Mr. Wilson?  
A. I did not.

Q. You knew before you came here that the company denied that his premium had been paid?

Mr. Merrill: Objected to as immaterial.

(Testimony of Walter M. Jones.)

The Court: He may answer.

A. I did know.

Q. Where were the premiums paid, to the Salt Lake City Office or the Kansas City Office?

A. Of recent years to the Salt Lake City Office.

Q. Did you examine the records of the company to see when the payments were made, before you came up here? [98]

A. I did not.

Q. Do you have any knowledge with reference to whether Mr. Wilson paid his premium?

Mr. Merrill: Objected to as immaterial. If they paid it they should prove it.

The Court: I take it that is what he is trying to do now. He may answer.

A. I do not.

Q. I think you stated that there was no record of his having paid his premium?

A. I don't recall such a statement.

Q. Have you made such a statement to your counsel?

A. I think not.

Q. Was Mr. Wilson's policy in force in April 8, 1947?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. I do not know.

Q. How long have you been in Salt Lake City?

A. Since 1923.

Q. You have no recollection of his premiums having been paid there?

(Testimony of Walter M. Jones.)

A. I do not, certainly not.

Q. What time—strike that—you can tell by looking at the policy when the premiums were payable?

A. Yes, sir. [97]

Q. When were they payable; first, Mr. Jones, do you need to look at the policy to say whether you know or not?

A. Yes, sir.

Q. Do you know what that is?

A. Yes, sir.

Q. What is it?

A. Policy of Accident and Health Insurance.

Q. In whose favor?

A. The insured's name is stated as Harry H. Wilson.

Q. By whom was it issued?

A. Business Men's Assurance Company of America.

Q. Can you tell whether this is the policy that is sued on here?

A. I cannot unless the number of the policy in the complaint is stated.

Mr. Davis: I offer the policy in evidence.

The Court: Any objection.

Mr. Merrill: None.

The Court: It may be admitted.

Q. Now, Mr. Jones, handing you exhibit 11, will you please advise us as to when the last premium on that policy, preceding April 8, 1947, would have been due?

A. There are three methods of paying the premiums—

(Testimony of Walter M. Jones.)

Q. When would the last premium, prior to April 8, 1947, have been due in order to keep the policy in force? [98]

A. There are three methods of paying the premium, quarterly, semi-annually, and annually. The anniversary date is December 1, that would be prior to April 7—December 1, 1946.

Q. Now, if the premium was paid and accepted by the Company about December 31, would the policy have been in force on April 8, 1947?

A. If paid semi-annually or annually.

Q. If either annual or semi-annual premiums was paid by Mr. Wilson or anyone on his behalf any time after December 1, 1946, the policy would have been in force at the time of Mr. Wilson's death?

Mr. Merrill: Objected to as not full enough. It doesn't give the amount.

The Court: I take it he means the amount of the annual or semi-annual premium. The witness mentioned the quarterly, semi-annual and annual premium, and the question specifically mentioned annual and semi-annual premium. I don't get the ground of your objection.

Mr. Merrill: I don't see how the witness can answer unless he knows the amount they are asking about.

The Court: Well, we will find out. He may answer. [99]

A. To answer that, so far as I am concerned, would require a qualifying statement.

The Court: You may do that.



(Testimony of Walter M. Jones.)

A. If this policy was continuously in force from the date of issue up to December 1, 1946, then the due date or anniversary date, December 1, 1946, would require a payment of \$31.00 or \$15.90 to continue it in force up to and beyond the date of death.

Q. If the premium was accepted by your Company or your office at any time before his death; if it was accepted, that is, \$15.90 or \$31.00 any time after December 1, 1946, under the terms of the policy then it would be in full force and effect?

A. If it had not previously lapsed.

Q. Doesn't the policy provide that, if it lapsed and if you accept the premium afterward it cures the lapsed condition?

A. If the Company receives it that is true.

Q. Look at exhibit numbered 12 and see if you know what it is? See if you recognize the endorsement on the back of it?

A. Yes, sir, I do.

Q. What is it? A. A check for \$31.00.

Q. Made payable to whom?

A. Business Mens Assurance Company.

Q. And endorsed by your Company?

A. Yes, sir. [100]

Q. In Salt Lake City, Utah? A. Yes, sir.

Q. And cashed?

A. Apparently so—deposited to account, but it is dated 2/25/47.

Mr. Davis: I offer this exhibit in evidence.

Mr. Merrill: May I ask a question on this.

The Court: Yes, you may.

By Mr. Merrill:

(Testimony of Walter M. Jones.)

Q. What effect does the date 2/25/47 have?

A. The premium due December 1, 1946, lapsed December 31, 1946, unless it was paid by that time. That is the usual procedure.

Q. So the policy would have been lapsed at the time this was sent?

A. Yes.

Mr. Merrill: We object to the introduction of this as being immaterial.

The Court: It may be admitted subject to your objection.

Q. Now, Mr. Jones, that check was sent you for payment of the premium on the policy on Harry H. Wilson?

A. Yes, sir.

Q. And it is stamped and marked on the back, premium payment or premium account. "For deposit only, Business Mens Assurance Company, premium account."?

A. That's right.

Q. Mr. Wilson had only one premium account?

A. Yes, sir.

Q. "Deposit only" means if it comes back, then, that man doesn't get credit, and that check was cashed and placed to the credit of the Business Mens Assurance Company?

A. Undoubtedly.

Q. You kept the money as payment of the premium?

A. Yes, it was accepted, and he would have to furnish evidence of insurability necessary to reinstate the policy.

Q. You accepted the check and cashed it and didn't notify him of any lapse of the policy?

(Testimony of Walter M. Jones.)

A. I cannot say.

Q. Why did you accept the check?

A. It is the usual procedure to do that.

Q. Did he ever receive any notice of the lapse or forfeiture of the policy?

A. I don't know of anything.

Q. It never went from your office?

A. We don't send out that notice, it is from the home office.

Q. If the policy is lapsed is it the practice to notify the policy holder to that effect?

A. I cannot say. I assume that is the practice.

Mr. Davis: That is all.

#### Cross-Examination

By Mr. Merrill: [102]

Q. Did you have anything to do with notifying policyholders of lapsed policies?

A. Nothing at all.

Q. The only thing you could do was to accept this check and the records would show what it was for at Kansas City?

A. That's right.

Q. They would look after it from that time on?

A. Yes, sir.

Q. The date of the check would indicate that the policy was lapsed?

A. Yes, sir.

Q. Lapsed from December 31, 1946?

A. Yes, sir.

Q. And the check is dated February 25, 1947?

A. It was tendered to us twenty-five days after the Grace period had expired.

(Testimony of Walter M. Jones.)

Q. Wouldn't it be a month and twenty-five days?

A. Yes, sir, it would.

Q. After the grace period had expired?

A. That is right.

Q. Look at the last page of the policy and see who countersigned it, Mr. Jones?

A. P. F. Koonse, registrar.

Q. Do you know where he lives?

A. Kansas City, I assume. [103]

Q. He is not with you?

A. Not a representative in the Salt Lake City office.

Q. The general office of the Company is in Kansas City?      A. That is right.

Q. And he is the registrar there?

A. Yes, sir.

Mr. Merrill: That is all.

Mr. Eberle: No cross.

### Redirect Examination

By Mr. Davis:

Q. You had been accepting these premiums before this time?

A. If I may explain, the Salt Lake City, Utah, office is a sales office and we accept some seventeen hundred payments a month. I never see any of them; they are sent in by mail and brought in by some individuals; they are accepted for deposit and payment of premiums just as this. The individuals in the office don't know whether the policy has lapsed or not when they accept the check.

(Testimony of Walter M. Jones.)

Q. Ever since you have been the branch manager people in Pocatello and this community have paid their premium in Salt Lake City, Utah?

A. Only the last eight years we have collected them.

Q. For the last eight years Mr. Wilson was authorized to pay his premium at Salt Lake City, Utah?

A. Yes, sir. [104]

Q. Every premium he paid, you cashed the check and sent it to Kansas City?

A. We deposited it at Walker Brothers Bank.

Q. What becomes of the money paid for premiums, is it credited to the man's account as payment?

A. I presume so.

Q. Kansas City office knows what policies are paid on,—what policies are covered by certain premiums?

A. Yes, undoubtedly.

Mr. Davis: With reference to plaintiff's exhibits 1 to 6. Those consist,—the first four of original letters between the Company and myself. I have produced the original letters they wrote me and they have produced my original letters to them. I want to offer plaintiff's exhibit 1 as a letter from my office to the Business Mens Assurance Company Kansas City, concerning this policy, advising them of Mr. Wilson's death by accident.

Mr. Merrill: No objection.

The Court: Admitted.

(Testimony of Walter M. Jones.)

PLAINTIFF'S EXHIBIT No. 1

[Letterhead]

B. W. DAVIS  
Attorney at law  
Ross-Davis Bldg.  
Pocatello, Idaho

April 21, 1947

Business Men's Assurance Co. of America,  
Kansas City, Mo.

In re: Harry H. Wilson—Policy 745330—Pocatello, Idaho.

Gentlemen:

This is to advise you of Mr. Wilson's death by accident from a pulmonary embolism.

Yours very truly,  
/s/ B. W. DAVIS

D/G

Received April 23, 1947.

Admitted March 17, 1948.



(Testimony of Walter M. Jones.)

Mr. Davis: It reads: "April 21, 1947, Business Mens Assurance Company of America, Kansas City, Missouri. In re: Harry Wilson—Policy 745 330 Pocatello, Idaho.

Gentlemen: This is to advise you of Mr. Wilson's death by accident from a pulmonary embolism. Yours [105] very truly, B. W. Davis.

Now, we offer in evidence plaintiff's exhibit 2 which is a letter under date of May 2, written by the Business Men's Assurance Company of America in reply to that letter, to me.

The Court: It may be admitted.

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PLAINTIFF'S EXHIBIT No. 2

[Letterhead]

Business Men's Assurance Company  
of America

215 Pershing Road . Kansas City 10, Missouri

May 2, 1947

Mr. B. W. Davis, Attorney,

Ross-Davis Bldg.

Pocatello, Idaho.

Harry H. Wilson, Deceased Pocatello, Idaho  
D-1735.

We are sorry to learn from your letter of the death of Mr. Wilson, and through you we extend to Mrs. Wilson and other members of the family our sincere sympathy in their sorrow.

(Testimony of Walter M. Jones.)

Enclosed are blanks to be used in giving proof of claim under policy 745330.

In furnishing these blanks, this Company does not waive any of the terms or provisions of the policy or any forfeiture that may have accrued to the Company thereunder.

/s/ E. F. SMITH,  
Chief Supervisor.

EFS:MD

C-51-2

C-50-2

C-53-1

C-52-2

Ret. Env.

Admitted Mar. 17, 1948.

Mr. Davis: It is on the letterhead of the Business Men's Assurance Company, and reads:

May 2, 1947. Mr. B. W. Davis, Attorney, Ross-Davis Bldg., Pocatello, Idaho.

Harry H. Wilson deceased, Pocatello, Idaho, D. 1735.

We are sorry to learn from your letter of the death of Mr. Wilson, and through you we extend to Mrs. Wilson and other members of the family our sincere sympathy in their sorrow.

Enclosed are blanks to be used in giving us proof of claim under policy 745330.

In furnishing these blanks, this Company does not waive any of the terms or provisions of the

(Testimony of Walter M. Jones.)

policy or any forfeiture that may have accrued to the Company thereunder. E. F. Smith, Chief Supervisor." with a notation "C-51-2; C-50-2; C-53-1; C-52-2.

Now, I would like to offer exhibit 3, that is a letter from my office to the Insurance Company.

The Court: Any objection? [106]

Mr. Merrill: None.

The Court: It may be admitted.

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PLAINTIFF'S EXHIBIT No. 3

[Letterhead]

B. W. DAVIS

Attorney at law

Ross-Davis Bldg.

Pocatello, Idaho

Business Men's Assurance Co. of America,  
215 Pershing Road,  
Kansas City 10, Mo.

Re: Harry H. Wilson, deceased, Pocatello,  
Idaho. D-1735

July 9, 1947.

Gentlemen:

Enclosed herewith is Mrs. Wilson's sworn statement and the statement of the undertaker. Mr. Wilson died of Pulmonary Embolism, which Mrs. Wilson understands to come within the terms of the Policy by reason of the decisions of the Su-

(Testimony of Walter M. Jones.)

preme Court of this State and the fact that this Embolism was an accident.

She has not answered you sooner because of the fact that she has been ill and not in condition to consider the matter.

Will you please furnish me with copies of the forms that are herewith enclosed so that we may have a record. You have not sent these forms in duplicate so that Mrs. Wilson could have exact copies.

Yours very truly,

/s/ B. W. DAVIS

D/g

Encls.

Received July 14, 1947.

Admitted Mar. 17, 1948.

Mr. Davis: It reads: "July 9, 1947. Business Men's Assurance Company of America. 215 Pershing Road Kansas City 10, Missouri. Re: Harry H. Wilson, deceased, Pocatello, Idaho, D. 1735.

Gentlemen,—Enclosed herewith is Mrs. Wilson's sworn statement and the statement of the undertaker. Mr. Wilson died of Pulmonary Embolism, which Mrs. Wilson understands to come within the terms of the policy by reason of the decisions of the Supreme Court of this State and the fact that this Embolism was an accident.

She has not answered you sooner because of the

(Testimony of Walter M. Jones.)

fact that she has been ill and not in condition to consider the matter.

Will you please furnish me with copies of the forms that are herewith enclosed so that we may have a record. You have not sent these forms in duplicate so that Mrs. Wilson could have exact copies. Yours very truly, B. W. Davis."

Mr. Merrill: It may be admitted I presume that the statement of what the writer thinks is the law is not an admission on our part.

The Court: The Court understands that.

Mr. Davis: I am now offering in evidence [107] exhibit 4 which is a letter in reply to the letter I wrote to the Company and which I have read.

Mr. Merrill: No objection.

The Court: Admitted.

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PLAINTIFF'S EXHIBIT No. 4

[Letterhead] Business Men's Assurance Company of America.

July 18, 1947.

Mr. B. W. Davis  
Attorney at Law  
Ross-Davis Bldg.  
Pocatello, Idaho

Harry H. Wilson, deceased, 553 S. Sixth, Pocatello, Idaho, D-1735.

This will acknowledge your letter of July 9 containing incomplete reports relative to Mr. Wilson's death which occurred April 8, 1947.

(Testimony of Walter M. Jones.)

After considering the facts contained in these reports I have been instructed to inform you that we will be unable to recognize Mrs. Wilson's application for the payment of the Accidental Death Benefit.

Among the reasons for this decision are the following:

1. Under the general provisions of the policy is specifically stated that the accident insurance under the policy covers all bodily injuries fatal or otherwise subject to the provisions, conditions, limitations specified in the policy except those caused wholly or partly as a result which are contributed to by bodily or mental infirmities, hernia, ptomaine, bacterial infections, or by any disease or medical surgical treatment therefore, such as hernia, ptomaine, bacterial infection, disease or medical surgical treatments to be construed as sickness.

2. No satisfactory proof has been submitted to the effect that Mr. Wilson's death was effected solely through accidental means.

3. That no affirmative proof of loss was furnished the Company within 90 days as required by the standard provisions of the policy.

Yours very sincerely,

/s/ E. F. SMITH,

Chief Supervisor.

EFS:HD

SLC.

Admitted Mar. 17, 1948.



(Testimony of Walter M. Jones.)

Mr. Davis: That letter is as follows: "July 18, 1947. Mr. B. W. Davis, Attorney at Law, Ross Davis Bldg., Pocatello, Idaho. Harry H. Wilson, deceased, 553 S. Sixth, Pocatello, Idaho. D1735.

This will acknowledge your letter of July 9, containing incomplete reports relative to Mr. Wilson's death which occurred April 8, 1947.

After considering the facts contained in these reports I have been instructed to inform you that we will be unable to recognize Mrs. Wilson's application for the payment of the accidental death benefit.

Among the reasons for this decision are the following:

1. Under the general provisions of the policy is specifically stated that the accident insurance under the policy covers all bodily injuries fatal or otherwise subject to the provisions, conditions, limitations specified in the policy except those caused wholly or partly as a result which are contributed to by bodily or mental infirmities, hernia, ptomaine, bacterial infections, or by any disease or medical surgical treatment therefore, such as hernia, ptomaine, bacterial infection, disease or medical surgical treatments to be construed as sickness.

2. No satisfactory proof has been submitted to the effect that Mr. Wilson's death was effected solely through accidental means.

3. That no affirmative proof of loss was furnished the Company within 90 days as required by

(Testimony of Walter M. Jones.)

the standard provisions of the policy. Yours very sincerely, E. F. Smith, Chief Supervisor."

Mr. Davis: Now, we offer in evidence plaintiff's exhibit 5, a statement by Mrs. Wilson, to the Company, as worn statement.

Mr. Merrill: No objection.

The Court: Admitted.

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### PLAINTIFF'S EXHIBIT No. 5

1

#### Beneficiary's Statement

Business Men's Assurance Company of America,  
Kansas City, Mo.

I, Cecelia J. Wilson, am the beneficiary named in Policy No. . . . ., of the Business Men's Assurance Company of America, and I hereby apply for the sum of \$. . . . . under the terms of said policy, and in support of this application I state the following facts:

1. Full name of deceased Harry H. Wilson.
2. Residence at the time of receiving injuries Pocatello, Idaho.
3. What was the date of birth of the deceased? March 15, 1886. Height? 5' 7". Weight? 155.
4. (a) When did he die? At about five o'clock a.m. on the 8th day of April, 1947. (b) Where did he die? St. Anthony Hospital, Pocatello, Idaho.

(Testimony of Walter M. Jones.)

5. What bodily injuries were received which it is claimed caused his death, and what external and visible marks of such injuries were found on the body of the deceased? (Give full particulars) He died of pulmonary embolism.

7. (a) What was deceased's occupation at the time of receiving the injuries? (If more than one, give all) Merchant. (b) By whom was he employed? Member of the partnership of Fargo-Wilson-Wells. (c) State all duties he performed in connection with such occupation Buyer & Manager.

8. Was he partially disabled by said injuries? No.

10. In what hospital, if any, was he confined? Name St. Anthony Hospital. Address, Pocatello, Idaho. From April 6, 1947, to Apr. 8, 1947.

11. State in detail what he did after he was injured. (This question requires an explicit answer) Died instantly.

12. Give names and addresses, in the order in which they were consulted, of all physicians and surgeons who attended or saw the insured after the injuries were received, with the dates of all such consultations and attendance Dr. O. F. Call, Pocatello, Idaho.

15. Was an inquest held? No.

16. Was an autopsy held? No.

17. (a) Had deceased received any prior injury? No. (b) Was deceased sick from any cause within

(Testimony of Walter M. Jones.)

five years preceding his last injury? If so, give names of all such sicknesses or diseases, approximate dates of each, and names and addresses of all attending physicians He had been confined to hospital. Dr. O. F. Call of Pocatello, Idaho, was his physician.

18. Was deceased up to the time he received the fatal injury in sound condition physically and mentally? Yes.

19. (a) Had deceased ever at any time had fits, disorders of brain or nervous system, vertigo, hernia, rheumatism, heart disease or any chronic disease or physical defect or deformity? If so, explain fully He had a hernia. (b) Had he ever had any impairment in hearing? No. Vision? No.

20. What were deceased's habits as to the use of drugs or intoxicants Very temperate.

21. Was the deceased under the influence of drugs or intoxicants at the time of the accident? No.

22. (a) Did he carry any other accident Insurance? Give names and addresses of all companies, amounts and dates of policies \$5000 in the New York Life Insurance Co. (b) Did he carry any life insurance? Yes. Give names and addresses of all companies, amounts and dates of policies, and state which, if any, had Double Indemnity provisions and in what amount He had policies with the New York Life Insurance Co., and the Columbia National Life Insurance Co.

(Testimony of Walter M. Jones.)

23. By what right do you claim this insurance?  
As beneficiary of the Policy and his surviving wife.

I agree that in furnishing this and other blanks,  
the Company reserves all its rights under its policy  
contract and waives none of the terms or conditions  
thereof, or any forfeiture that may have accrued  
to it thereunder, and I reserve all of my rights.

/s/ CECELIA J. WILSON,

Age 52.

553 S. 6th, Pocatello, Idaho.

State of Idaho,

County of Bannock—ss.

Personally appeared before me the said Cecelia  
J. Wilson personally known to me to be the person  
represented to be and subscribed and made oath  
to the truth of the foregoing statement.

Witness my hand and seal at my office in Poca-  
tello, Idaho, this 9th day of July, 1947.

[Seal] /s/ LAURA S. GOUGH,

Notary Public.

My Commission expires Sept. 18, 1950.

Received July 14, 1947.

Admitted Mar. 17, 1948.

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Mr. Davis: These matters are in the record.  
So I will now offer exhibit 6, the Undertaker's state-  
ment, that, too, is a sworn statement which was

(Testimony of Walter M. Jones.)

mailed to the Company and which Mr. Merrill has given me from their files.

Mr. Merrill: No objection.

The Court: Admitted.

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PLAINTIFF'S EXHIBIT No. 6

Undertaker's Statement

Business Men's Assurance Company of America,  
Kansas City, Mo.

1. Give name of deceased Harry H. Wilson.
2. Give the date and place of his death April 8, 1947, at Pocatello, Idaho.
3. What was the cause of death? Pulmonary Embolism.
4. Did you personally know the deceased during his life time? Yes.
5. Did you prepare the body for burial? Yes.
6. When and where was the body buried? Pocatello, Idaho, Mountain View Cemetery, at Pocatello, Idaho.
9. Do you know the body buried by you to be that of the person named as deceased in the beneficiary's statement which is a part of these proofs of death? Yes.

/s/ JACK HENDERSON,

So. Arthur, Pocatello, Idaho



State of Idaho,  
County of Bannock—ss.

Personally appeared before me the said Jack Henderson personally known to me to be the person who represents himself to be and made oath to the truth of the foregoing statement.

Witness my hand and seal this 9th day of July, 1947.

[Seal]        /s/ LAURA S. GOUGH,  
Notary Public.

My Commission expires Sept. 18, 1950.

Received July 14, 1947.

Admitted

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LAURA S. GOUGH

being called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Now, Mrs. Gough, if you will get those exhibits 1 to 6 [109] in their order, please.

A. Yes, sir.

Q. You are employed in my office?

A. Yes, sir.

Q. And have been for a number of years?

A. Yes, sir.

Q. Do you as an office employee and secretary in that office take care of the filing of all corre-

(Testimony of Laura S. Gough.)

spondence and of the handling of all of the mail and records?      A. I do.

Q. I call your attention to the matter of Harry H. Wilson, deceased and the matter of his estate, are you familiar with that matter in my office?

A. I am.

Q. Are you familiar with the facts as to whether there were a number of insurance policies involved after his death?      A. I am.

Q. Do you know of your own knowledge of the receiving of blanks and claims from different insurance Companies?      A. I do.

Q. Have you looked at those six pages, those exhibits numbered one to six, which are original letters and statements. Now, calling your attention to those six exhibits have those, or were those under your care, and did you handle them in connection with the life insurance policy with [110] the Business Mens Assurance Company of America?      A. Yes, sir.

Q. Do you recognize,—for instance,—exhibit 1?

A. Yes, I do.

Q. And exhibit 2?      A. Yes, sir.

Q. I call your attention to exhibit number 2, and on the bottom of that there are four numbers indicating that there were four forms inclosed with that letter. Do you see those figures?

A. Yes, sir.

Q. Now, I will ask you to look at exhibits 5 and 6, who did the typing on those?

(Testimony of Laura S. Gough.)

A. On number five, I did that.

Q. And on number 6?

A. That was done by Jack Henderson, the undertaker.

Q. Did you take it to the undertaker and did you secure number 6?      A. Yes, sir.

Q. Did you take the other to Mrs. Wilson's home for her to sign?      A. Yes, sir, I did.

Q. Were all the forms that came to my office filled out?

A. All the forms we received were filled out.

Q. And were they returned?

A. Yes, sir. [111]

Q. Were there any other forms received in exhibit 2 except the forms five and six?

A. No, I don't believe there were. Those were the only two.

Q. What is your recollection as to whether all the forms received from this company, or any other company were filled out?

A. Every one was filled out.

Q. Have you searched your records to see if there was a form called "eye Witness" form or a "physician's form" included in this exhibit from the Business Mens Assurance Company?

A. Yes, sir, I have.

Q. Were they in the files?

A. They were not.

Q. Are they in the files?      A. They are not.

Mr. Davis: That is all, you may examine.

(Testimony of Laura S. Gough.)

Cross-Examination

By Mr. Merrill:

Q. There were a number of other insurance policies that were delivered to you?

A. There were a number of other policies.

Q. In each of these insurance policies there were claims presented to the Companies to be filled out,— I mean the claims were presented by the Companies?

A. Yes, sir. [112]

Q. In each of them there was always a Doctor's certificate?

A. I am not sure, but I think there was.

Q. As a matter of fact when you got plaintiff's exhibit 2, which is the letter from the Company, dated May 2, 1947, you noticed there were four exhibits listed on the bottom of the letter?

A. I don't recall that I did.

Q. They are listed there?

A. Yes, there is a list of numbers there.

Q. Do you know that those numbers refer to claims that were to be filled out?

A. No, I cannot say that I do.

Q. You didn't make comparison with the two that were filled out to see that the numbers were those numbers?

A. No, I don't think I did.

Q. You took any letter that Mr. Davis would write?

A. Yes, sir.

Q. Did Mr. Davis dictate any letter to the effect that there was no form for the Doctor's statement?

(Testimony of Laura S. Gough.)

A. I don't recall.

Q. You don't have a recollection that there was a Doctor's Statement?

A. I know that we sent back the forms we received.

Q. You received the letter indicating the four forms inclosed?

A. That letter is number 2. [113]

Q. You did not receive from Mr. Davis any letter, or any dictation advising the Company that there was no form for the Doctor's certificate?

A. Not that I recall.

Q. You didn't have any doctor's certificate form of the Business Mens Assurance Company?

A. We filled out all that we received.

Q. Did you fill out any for the Doctor, or do you recall having one filled out by the Doctor for Harry H. Wilson?

A. I don't recall that.

Q. You don't remember having any filled out?

A. I don't recall.

Mr. Merrill: That is all.

Mr. Davis: There was some confusion over exhibit 7 which is the original hospital record and exhibit "A" referred to in the deposition of Doctor Call's which was a photographic copy. The confusion came about through counsel's fault, and I don't mean counsel for the defendant. I have ascertained that it will be agreeable to leave with the hospital a photographic copy and that we may let number 7, the original hospital record, stay in the file and not ask to withdraw it.

(Testimony of Laura S. Gough.)

The Court: That will be satisfactory. I think we will recess for ten minutes. [114]

4:10 P.M., March 17, 1948

Mr. Davis: In the case of Wilson vs. Business Mens Assurance Company we rest.

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DR. MELVIN M. GRAVES

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. How long have you been here in Pocatello?

A. About one and a half years.

Q. State briefly your formal education?

A. B.A. Western Reserve University and M.D. at Harvard Medical School. I have had about eight years' hospital training experience, limited solely to surgery.

Q. You have specialized in surgery for eight years? A. Yes, sir.

Q. Are you a fellow in the American College of Surgeons? A. Yes, sir.

Q. Certified by the American Board of Surgery?

A. Yes, sir.

Q. Are you the only Doctor in Pocatello so certified? A. So far as I know.

Q. You have had practical experience in herniorrhaphy?



(Testimony of Dr. Melvin M. Graves.)

A. I am a general surgeon and do a lot of hernias.

Q. During those years and while you were an interne what [115] experience have you had with pulmonary embolism?

A. I have seen quite a few such cases.

Q. Have you made a study of the cause and effect of emboli?      A. Yes, sir.

Q. Also the statistics as to their occurrences?

A. Yes, sir.

Q. Doctor, will you tell us briefly a surgeon's attitude toward any sort of embolism as to whether it is expected, anticipated and reasonably foreseen?

A. It is one of the complications which a surgeon may encounter in following major surgery.

Q. Is it the principal cause of post-operative deaths?

A. You mean by that all post-operative deaths,—I would rather alter that to limit it to hernia.

Q. Well, limit it to hernia.

A. It is the most common cause in hernia operations.

Q. Are there any precautions to avoid or prevent post-operative embolism?

A. Yes, there are.

Q. State generally what they are?

A. Early ambulation; getting the patient up soon after surgery so he is not bedfast.

Q. Pre-operative procedure I referred to in particular?

(Testimony of Dr. Melvin M. Graves.)

A. Well, there are certain clinics where rather radical type of treatment is done, that is ligation of femur veins in both legs on all patients in the older age group [116] who are subject to any major surgery.

Q. Are you familiar with the percentage of cases, in all age groups, of post-operative deaths resulting from pulmonary embolism?

A. In large hospitals where such statistics can be gathered approximately one in eight or nine hundred.

Q. That is major surgery of any kind?

A. Yes, sir.

Q. What could you say as to a surgeon commencing surgical procedure as to whether he could reasonably foresee pulmonary embolism in any surgical procedure?

A. It is something every surgeon undertaking an operation knows might happen and hopes wont happen.

Q. It is reasonably foreseeable in any operation?

A. I think that is a fair statement, yes, sir.

Q. What are the statistics with reference to hernia operations?

A. The present mortality rate for all hernias in well run institutions should run one and a half to two per cent mortality,—should be below that,—and over half of those will be due to pulmonary embolism.

Q. Over fifty per cent of post-operative deaths in hernia cases are due to pulmonary embolism?

(Testimony of Dr. Melvin M. Graves.)

A. Yes, sir.

Q. What effect does the age group have upon the expectancy of death from Pulmonary embolism in hernia operations? [117]

A. The expectancy is much greater in older age groups.

Q. What about a person sixty-one years old, what about that age group?

A. It would be four or five times more than in the third decade.

Q. A surgeon would expect four or five times as great a number of embolisms in that age group than in the younger group? A. Yes.

Q. Where is the most prevalent origin of embolus that might result in pulmonary embolism?

A. The best information gathered from autopsy statistics seems to point to the lower veins. In the calf muscles; the tibia which is the bone between the knee and the ankle, that is the most prevalent,—the place where the thrombi arises.

Q. Can they arise from immobilization?

A. Yes, sir, they can.

Q. Regardless of surgery?

A. Yes, sir, that's right.

Q. In post-operative procedure or treatment is the use of opiates common? A. Yes, sir.

Q. And sedatives? A. Yes, sir.

Q. What does sedatives do to a person, a patient?

A. It allays pain and depresses centers in the nerve system. [118]

(Testimony of Dr. Melvin M. Graves.)

Q. And brings about relaxation?

A. Yes, sir.

Q. What does it do to the breathing where a person is under opiates?

A. It tends to slow the respiration if it was an opium.

Q. Did you examine the hospital record in this case? A. I did, I think it was pantopon.

Q. What effect would that have as to relaxation?

A. That might produce considerable relaxation and tends to slow the respiration.

Q. What happens with reference to secretion and mucous draining to the trachea where a person is under that type of opiate and sedative?

A. It may tend to run down the trachea more than if the patient was awake.

Q. Is that the common and natural procedure and consequence in case of opiates following surgery? A. Yes, sir.

Q. Doctor, will you explain snoring?

A. It is caused by a relaxation of the jaw muscles which allows the mouth to open. Usually it is associated with an obstruction in the nasal cavity and the passing of air in this manner causes the soft palate to vibrate and the tongue may also drop backward which contributes to the noise. [119]

Q. Would that increase or decrease the mucous draining to the trachea?

A. It has been my observation that most patients who have been breathing that way, they tend to have a dry mouth because the air is not going through

(Testimony of Dr. Melvin M. Graves.)

nasal passage which is a humidifier and gets moisture in the air.

Q. When a person isn't under opiates and this mucous drains down the trachea what does he do?

A. He wakes with a start and tries to cough it up.

Q. When he isn't asleep?

A. He coughs it up.

Q. That is the mechanism to clear the trachea?

A. That's right.

Q. When he is under opiates that continues to drain? A. Yes, sir.

Q. The mechanism for bringing it up isn't working? A. It may not.

Q. Because of his being under the opiate?

A. That's right, that may contribute to it.

Q. When he wakes what is the post-operative treatment as to advising the patient what to do?

A. To turn this patient from side to side and encourage the patient to cough this material up.

Q. And what happens if that is not done?

A. This mucous may get to the smaller bronchi,—the smaller [120] air passage and it may lead to atelectasis.

Q. What is that?

A. It is a collapse of the lung.

Q. And results in what?

A. You have a very ill patient and they may, if infection develops on top of the atelectasis, they may die.

(Testimony of Dr. Melvin M. Graves.)

Q. It is proper procedure to urge them to cough and bring up that mucous?

A. That is right.

Q. Did you check the hospital record here, exhibit 7?

A. I checked a photographic replica of it.

Q. Can you tell from that record when Mr. Wilson started to deteriorate?

A. It appears that about 12:30 the respiration seemed to change in character and become irregular and cyanosis was noted at that time. That is apparently when the major trouble started.

Q. From an examination of that record, exhibit 7, could you ascertain the cause of Mr. Wilson's death?

A. No, I couldn't.

Q. Assuming that he died at five a.m. April 8, 1948, in the light of that record, from what cause could he have died?

A. He could have died from cerebro vascular thrombosis,—embolism; coronary thrombosis,—embolism or pulmonary [121] embolism.

Q. Acute heart failure?

A. That is possible.

Q. Could the cause of his death be determined other than by autopsy?

A. In my opinion, no.

Q. When immobilization takes place for any period of time just state in a general way the effect upon the circulatory system, will you, Doctor. Can you give the process of building up an embolism or thrombus if it has a tendency to do that?



(Testimony of Dr. Melvin M. Graves.)

A. Of course, immobilization means putting a person at rest,—bed rest, and such a situation leads to stasis of the blood?

Q. What do you mean by stasis?

A. The blood slows down in the rate of flow or stops flowing. This creates, particularly in the veins of the leg,—and the reason for this is the return of blood from the lower extremities is not a simple process, it is necessary that the lower extremities be moving, tracting of the muscles helps to propel the blood to the heart. If you have a patient in bed this rate of flow may slow down and it may stagnate.

Q. Where surgery is performed what effect does that have on stagnation in the abdominal and pelvic region and the lower extremities? [122]

A. You have to give some form of anesthesia to place that patient at rest and during that time the circulation becomes poor.

Q. It slows the circulation? A. Yes, sir.

Q. What does slow circulation do with reference to being a factor in the creation of emboli?

A. It is a major contributing factor. If there is a slight defect in the lining of the vessel, which is common in older people, this slow moving blood is much more likely to clot at that point.

Q. Suppose there is a thrombosis, what effect does the stagnation of the blood and immobilization have on that breaking?

A. Stagnation allows that clot to build up and become larger.

(Testimony of Dr. Melvin M. Graves.)

Q. And then break away?

A. In the direction of the heart until it gets to the next major branch. It is like a network of rivers and creeks, a clot is created at a certain point and then this will and does go back to the next largest tributary of the system. It gets into the circulation or the circulatory system.

Q. A thrombosis is attached to a major vessel?

A. Sometimes loosely attached.

Q. What causes it to break away?

A. Muscular activity.

Q. Doctor, what about the condition of the venous system [123] being a separate disease entity?

A. I don't see what you mean.

Q. Is it a co-existing condition?

A. Well, it is one of the systems of the body that has disease processes.

Q. Tell us, Doctor, about the disease process in the veins that is a co-existing condition with surgical procedure.

A. If I understand you,—an individual may have little plaques in these veins and you put him in bed for any reason,—for a major operation or anything; you immobilize him; that leads to stasis of the blood in these veins which may lead to thrombosis at the site of this abnormality in the vessel wall. It eventually gets back to this next major tributary as I said and at some time with what is characterized as a severe muscular strain this clot breaks off and goes into the general circulation; it

(Testimony of Dr. Melvin M. Graves.)

gets into a vessel that supplies the lung and if it is large enough to occlude this vessel the patient dies; if it is smaller and goes to a smaller vessel of the lung he may cough up blood.

Q. Can this be designated as a disease process of the veins?      A. Of the venous system.

Q. That is co-existing at the time of the surgical procedure?      A. Yes, sir.

Q. Can there be a thrombosis or clot remain after surgical operation that is not torn loose but remains in the [124] vessel itself?      A. Yes, sir.

Q. That can be loosened later?

A. Ordinarily when a clot remains for any length of time it undergoes reorganization as we say. It becomes definitely attached to the vessel and new blood vessels grow into it. That makes new small vessels through that clot.

Q. But it could break away?

A. Within certain length of time.

Q. A year?

A. I would say that is a little long. I would say not over three or four months.

Q. Following herniorrhaphy, in your opinion, would death following an embolism be the result of the herniorrhaphy?

A. Yes, I think it would.

Q. Explain why.

A. If a man has an inguinal hernia and on physical examination you find he is in reasonably good health; you admit him to the hospital, you admit

(Testimony of Dr. Melvin M. Graves.)

him for operative treatment; you are going to repair it by surgery; that is the disease for which he is admitted to the hospital. If he dies from some secondary event the hernia for which he is admitted is the principal cause of death and the terminal event is a contributing cause of death. [125]

Q. Would any effect that was dependent upon the venous system be incidental to that surgical procedure? A. Yes.

Q. And co-existing with it? A. Yes, sir.

Q. Under those conditions would you say that the hernia was the contributing cause?

A. I would say it is the principal cause; no hernia, no death. If it had not been that he was admitted to the hospital for treatment for hernia he would not have died.

Mr. Eberle: I believe that is all.

### Direct Examination

By Mr. Merrill:

Q. Doctor, assuming that the man died of pulmonary embolism—withdraw that, please,—Doctor, I understood you to say you studied the chart and the deposition of Doctor Call? A. Yes, sir.

Q. From such information as you were able to get from that study one cannot say that he died from Pulmonary embolism, is that right?

A. I cannot say that.

Q. Would you say that the average practitioner would be able to say that; one skilled in surgery, would he be able to say that?

(Testimony of Dr. Melvin M. Graves.)

A. In my opinion it would be necessary to have an autopsy. [126]

Q. If he died from pulmonary embolism, would the operation for hernia twenty hours earlier be a contributing cause?

A. In my opinion it is the chief cause.

Q. If there had been no hernia there would have been no operation? A. That is right.

Q. If there was no operation there would be no embolism? A. That is right.

Q. If there had been no embolism there would have been no death? A. That is right.

Q. So death was directly caused by the hernia?

A. That is my opinion.

Q. Hernia was a bodily infirmity?

A. That is right.

Mr. Merrill: That is all.

Mr. Davis: No questions.

Mr. Eberle: I would like to have published the deposition of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor James L. Stewart.

Mr. Davis: They can be considered as read from the witness stand, as far as I am concerned.

The Court: Then it will be understood that the Court reporter can copy them into the record.

Mr. Merrill: With like effect as if read at this time and as if the witness was on the stand. [127]

The Court: It will be understood that the Court reporter can copy them into the record with that effect, Mr. Merrill.

(Testimony of Dr. Melvin M. Graves.)

Mr. Davis: We haven't made any objections throughout the depositions.

The Court: And you have read the depositions, Mr. Davis?

Mr. Davis: Yes, Your Honor, and I waive any objection to any of those questions.

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### DR. JOSEPH BEEMAN

after being first duly sworn, testifies as follows on behalf of the defendants:

#### Direct Examination

By Mr. Eberle:

Q. Will you state your name?

A. Joseph Beeman.

Q. Where do you reside?

A. Boise, Idaho.

Q. And your profession?

A. Physician and surgeon.

Q. State generally your formal qualifications, your education?

A. I graduated from the University of Oregon Medical School in 1937. I have had post-graduate training in pathology. I am a certified specialist in pathology, certified by [128] the American Board of Pathology and a member of the American College of Pathologists.

Q. You are licensed to practice medicine in Idaho? A. Yes, sir.

Q. Were you an instructor in pathology at Oregon? A. Yes, sir. 1939 to 1946.



(Testimony of Dr. Joseph Beeman.)

Q. Did you practice pathology in Oregon?

A. Yes, sir.

Q. During what period did you practice pathology in Oregon?      A. 1937 to 1946.

Q. You came to Idaho in 1946?

A. Yes, sir.

Q. And since then you have practiced in Boise?

A. Yes, sir.

Q. What official position do you hold here in Boise?

A. Attending pathologist at St. Lukes and consulting pathologist at the Veterans Administration, Boise.

Q. Since 1946 have you performed any autopsies in southern Idaho?      A. Yes, sir.

Q. About what percentage of the autopsies have you performed in Boise?

A. I would say about sixty per cent.

Q. Of all autopsies performed? [129]

A. Yes, sir, in Boise, in other communities I am not familiar.

Q. Now, Doctor, can you give us the approximate number you have had since you have been in Boise?

A. Probably between a hundred and a hundred fifty.

Q. Autopsies?      A. Yes, sir.

Q. You have also done autopsies elsewhere?

A. Yes, sir.

Q. Give the approximate number?

A. Something over two thousand.

(Testimony of Dr. Joseph Beeman.)

Q. Have you read the deposition of Dr. O. F. Call, taken in this case?

A. I have read it, yes, sir.

Q. And have you examined the hospital record referred to in this deposition, as exhibit A?

A. Yes, sir.

Q. Now, Doctor, will you briefly describe what is known as embolism?

A. An embolism is the plugging of a hole or the hole in an artery due to foreign materials or due to fragments of blood clot which arise in another primary source.

Q. And what is a pulmonary embolism?

A. A pulmonary embolism is the plugging of the hole in the pulmonary arteries by a foreign material or blood clot which arises from some other source. The pulmonary arteries [130] are the large blood vessels leading from the heart to the lungs supplying the lungs with blood.

Q. Can you distinguish for us embolism and thrombosis?

A. Yes, sir.

Q. Do so.

A. Well, a thrombus is a clot of blood inside a blood vessel during life; an embolus is a portion of this blood clot or other foreign material which is set loose in the blood stream and travels through the blood stream. In other words, a thrombus is a clot in the vessel wall, whereas, an embolus is a moving particle of this clot or other foreign body.

Q. Is the symptomatology similar in the case of

(Testimony of Dr. Joseph Beeman.)

death of pulmonary embolism and death as a result of coronary thrombosis?

A. The symptoms of death from pulmonary embolism and death from coronary thrombosis may be quite similar.

Q. Doctor, is the case of post-operative death occurring approximately twenty hours after surgery, in your opinion, can it be determined whether such death occurred as a result of pulmonary embolism or coronary thrombosis without an autopsy?

A. In my opinion it cannot.

Q. Does a pulmonary embolism originate in the venous portion of the vascular system? [131]

A. Yes, sir.

Q. State just how pulmonary embolism arises in the venous system, will you, Doctor?

A. A pulmonary embolism arises in the venous system either by introduction of foreign material such as oil or air into the venous circulation or due to disease of the venous circulation, caused by stagnation of blood, infection or injury; blood clots in the venous system with a resulting venous thrombus; particles of this thrombus or blood clot in the venous system become detached and travel through the veins to the right side of the heart and from there are propelled into the pulmonary arteries causing a blocking of these arteries, or pulmonary embolism.

Q. Assuming, Doctor, that Harry H. Wilson, referred to in the deposition of Dr. O. F. Call, died

(Testimony of Dr. Joseph Beeman.)

of a pulmonary embolism approximately twenty hours after a hernia operation, referred to in said deposition, which took place on April 7, 1947. In your opinion would prior surgery, referred to in said deposition, including a hernia operation upon the man have any effect upon such a pulmonary embolism?      A. In my opinion, yes.

Q. In what way?

A. For the reason that an operation for intestinal obstruction and repair of the hernia could easily have caused a venous thrombus at that time, and the hernia operation on April 7, [132] 1947, may have been the exciting factor in causing this venous thrombus to break down and form a pulmonary embolism.

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery.

Q. Doctor, in your opinion, can a pulmonary embolism come from immobilization at the time of the surgical procedure?

A. Yes, sir, for the reason that immobilization during and following surgical procedure, as well as the effect of the anesthetic tends to cause stagnation of the blood in the veins,—in the venous system and this stagnation is one of the major causes of venous thrombus and venous thrombus is likewise the major cause of pulmonary embolism.

(Testimony of Dr. Joseph Beeman.)

Q. Doctor, where a hernia operation has been skillfully performed, in your opinion, would a pulmonary embolism be a natural result of the immobilization incident to the surgical procedure?

A. Yes, sir.

Q. Just explain in what way such result would be a natural consequence?

A. The immobilization of the patient with resulting stagnation of blood may in itself cause venous thrombus with resultant pulmonary embolism.

Q. Now, Doctor, referring to the hospital chart or record marked exhibit "A" and from an examination of the hospital record marked "A" when did the process which terminated in death commence?

A. The nurse's notes, beginning at 12:30 a.m. Tuesday, April 8, 1947, indicated that at that time the patient became cyanotic, had irregular respiration and from this time until his death at 4:45 a.m. the nurse's notes indicate the patient progressed into death.

Q. Doctor, from an examination of the hospital record exhibit "A," can one, in your opinion, reasonably conclude that death was the result of pulmonary embolism?

A. From an examination of the record Exhibit "A," in my opinion, I cannot conclude the cause of death, whether from pulmonary embolism or other causes.

Q. Can you conclude from an examination of ex-

(Testimony of Dr. Joseph Beeman.)

hibit "A" that Harry H. Wilson died of a pulmonary embolism?           A. No.

Q. Now, Doctor, in your opinion, is post-operative pulmonary embolism reasonably foreseeable?

A. Yes, sir.

Q. Is it sufficiently foreseeable that precautions are taken to avoid it?           A. Yes, sir.

Q. Assuming the fact stated in the deposition of Doctor Call [134] and in the hospital record, exhibit "A" to be true, and that Harry H. Wilson died about five o'clock a.m. on April 8, 1947, of a pulmonary embolism, in your opinion, was such an embolism, under such circumstances reasonably foreseeable?

A. Yes, under the facts as given, a pulmonary embolism should have been looked for and anticipated.

Q. Now, Doctor, is a post-operative pulmonary embolism a natural result or consequence of surgical procedure or immobilization?

A. Assuming skilfull surgery without a large amount of manipulation and injury, the pulmonary embolism is a result of co-existing disease process in the venous system and a natural result of surgery or immobilization.

Q. Now, Doctor, in case of inguinal hernia where the operation was skilfully performed without any unusual incident, the operation being very smooth, would there be any large amount of handling or injury such as you mentioned above?           A. No.



(Testimony of Dr. Joseph Beeman.)

Q. Doctor, assuming the facts in the deposition of Doctor Call and the hospital record exhibit "A" to be true, and that Harry H. Wilson died of a pulmonary embolism at five o'clock a.m., April 8, 1947, would such an embolism be anticipated under such circumstances?

A. Yes, sir, in any surgical procedure a pulmonary embolism should be anticipated. [135]

Q. Now, Doctor, is a post-operative pulmonary embolism accidental?

A. In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated.

Mr. Eberle: That is all, thank you, Doctor.

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DR. O. F. SWINDELL

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name, please?

A. O. F. Swindell.

Q. You reside at Boise? A. Yes, sir.

Q. And your profession? A. Medicine.

Q. You are licensed to practice medicine in the State of Idaho? A. Yes, sir.

Q. State briefly your formal qualifications?

A. My education and so forth, you mean?

(Testimony of Dr. O. F. Swindell.)

Q. Yes.

A. Graduated from Jefferson Medical, Philadelphia, in 1926. [136] Served two years in the Philadelphia General Hospital and came to Idaho in 1928, entered the practice with Dr. E. Laubaugh and practiced with him until 1933 and since that time I have practiced internal medicine in my own office in Boise.

Q. You are practicing internal medicine, specializing in that? A. Yes, sir.

Q. You have been Chief of Staff at St. Luke's Hospital?

A. Yes, sir, two or three years during the war.

Q. It was about 1942 to 1945?

A. I think that is right and I was also president of the State Medical Association at one time.

Q. Have you read the deposition of Dr. Call in this case? A. Yes, sir.

Q. Have you examined the hospital record referred to in the deposition of Dr. Call's, as exhibit "A"? A. Yes, sir.

Q. Dr., can you describe briefly and in as much lay language as possible the nature and description of pulmonary embolism?

A. Pulmonary embolism is the result of a blood clot which becomes free in the blood stream and is carried to the lungs by way of the heart to the pulmonary artery, lodging in a vessel in the involved lung. I might qualify that by saying that a clot or other foreign body. Anything can produce it besides a clot. [137]

(Testimony of Dr. O. F. Swindell.)

Q. Doctor, can you tell us briefly about a thrombus or thrombosis?

A. A thrombus is a clot, a blood clot which forms within a vessel resulting in an obstruction of the vessel at the site of its formation.

Q. Is there any substantial difference in the symptomatology of a pulmonary embolism and a thrombus?      A. No.

Q. The embolism arises in the venous system, is that correct?

A. Yes, it could arise in the venous system or arterial system or it may arise in the heart.

Q. All pulmonary embolisms arise in the venous system, is that right?

A. Or the right side of the heart which is theoretically a part of the venous system?

Q. Can you distinguish between coronary thrombosis and pulmonary embolism?

A. Both conditions produce obstruction to the involved vessel. In a pulmonary embolism the involved vessel is in the lung, in coronary thrombosis the embolism is in one of the coronary vessels of the heart. Symptomatically they are difficult to distinguish.

Q. Can you tell the difference in the origin of the clot in those two, coronary thrombosis and pulmonary embolism?

A. In coronary thrombosis the clot originates in the coronary [138] artery; in pulmonary embolism the clot originates either in the heart or in the venous system?

(Testimony of Dr. O. F. Swindell.)

Q. Can you describe briefly how and in what manner embolism originates in the venous system?

A. When the embolus originates in the venous system there is first formed a thrombus; portions of this thrombus break off and float free in the blood stream producing an embolus.

Q. Can these particles break loose as an incident to surgical procedure?           A. Yes, sir.

Q. That would be due to trauma or ligation?

A. Due to a number of factors, one is trauma from surgery, another is immobilization of the patient in bed, other contributing factors are the age of the patient and his general condition at the time of the operative procedure.

Q. Now, Doctor, is pulmonary embolism a reasonably foreseeable thing? Is pulmonary embolism reasonably foreseeable from surgical procedure and immobilization?

A. Any patient who is operated on presents a potential case for pulmonary embolism.

Q. When you mention operations you include operations for hernia?

A. Any kind of operation.

Q. Would the same be true of immobilization as incident to [139] surgical procedure?

A. Yes, immobilization predisposes to the formation of thrombi and emboli.

Q. In your opinion pulmonary embolism is a risk or hazard in every case of surgical procedure or immobilization?           A. Yes, sir.

(Testimony of Dr. O. F. Swindell.)

Q. Is there any preventative to prevent or mitigate pulmonary embolism? A. Yes, sir.

Q. In your opinion is this procedure based upon the fact that pulmonary embolism is reasonably foreseeable in any of these cases?

A. Yes, sir, I think so. Most surgeons use a measure to prevent emboli in the care of every post-operative patient.

Q. Including operations for hernia?

A. Yes, sir, including operations for hernia.

Q. Doctor, from an examination of the hospital record exhibit "A", in your opinion, is there anything to indicate that the death of Harry H. Wilson was due to pulmonary embolism?

A. The record indicates that the man died very suddenly and death from pulmonary embolism or pulmonary emboli can be sudden, but sudden death doesn't indicate that the man died from pulmonary embolism.

Q. The record, in your opinion, would be symptomatic of what? [140]

A. The record mentions that the patient had irregular breathing and irregular pulse, that he was restless. The irregular pulse would indicate that there was some heart disturbance at this time; irregular respiration could be the result of a heart disturbance or the result of administration of drugs to control pain.

Q. In your opinion, is a post-operative pulmonary embolism accidental?

(Testimony of Dr. O. F. Swindell.)

A. No, I don't think it is.

Q. Will you just state your reasons, briefly?

A. Post-operative embolism is something which surgeons think of or anticipate prior to and after surgery. They all take certain measures to reduce the chances of post-operative pulmonary embolism.

Q. Is it one of the natural consequences of every surgery or immobilization?

A. Yes, I think it is.

Q. Whenever you say surgery that includes hernia operations?

A. It includes all operations whether it is hernia or anything else.

Q. Doctor, in your opinion are post-operative deaths following hernia operations more prevalent than in other surgical procedure?

A. The only comparison is in Cecil's Text Book of Medicine in which he states that pulmonary emboli following operations [141] for hernia are five times more frequent than in operations for appendicitis, except in cases where the appendix is ruptured.

Q. Is Cecil's Text Book of Medicine a recognized authority in the medical profession?

A. Yes, sir, it is.

Q. Doctor, assuming the facts stated in Doctor Call's deposition and the hospital record, exhibit "A" referred to in such deposition to be true and that Harry Wilson died about five o'clock A. M., April 8, 1947, of a pulmonary embolism. In your opinion, was such embolism to be anticipated as a



(Testimony of Dr. O. F. Swindell.)

natural and probable result of the surgical procedure mentioned in such deposition and in Exhibit "A", and was it reasonably foreseeable?

A. Yes, sir, in that we know that a certain percentage of all surgical cases have emboli and this percentage is particularly high in the age group in which this patient falls.

Q. Assuming, Doctor, that Harry Wilson died of a coronary thrombosis, in your opinion, would such thrombosis be accidental?           A. No.

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DR. F. A. PITTENGER

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle: [142]

Q. State your name, Doctor?

A. F. A. Pittenger.

Q. You live in Boise?           A. Yes, sir.

Q. Your profession?

A. Physician and surgeon.

Q. You are licensed to practice in Idaho?

A. Yes, sir.

Q. State your formal qualifications, briefly?

A. Well, I have practiced medicine for forty-nine years, ninety percent of my practice has been surgery.

Q. Your education and training?

(Testimony of Dr. F. A. Pittenger.)

A. Graduated from two schools and served an internship, worked for a physician four years on a salary; associate professor of surgery in Honaman Medical in Chicago.

Q. You have been Chief of Staff at St. Alphonsus Hospital for a good many years?

A. Twenty-two years.

Q. Doctor, in your half century of surgical practice how many cases of surgery would you say you have had?

A. Oh. I don't know, but many thousands.

Q. Doctor, in your long career as a surgeon you have become familiar with the cause and effect of embolisms?

A. Yes, sir.

Q. Also pulmonary embolism? [143]

A. Yes, sir.

Q. Will you just state briefly where a pulmonary embolism comes from, Doctor?

A. In case of surgery it ordinarily comes from the site of the operation where a blood clot has formed, this clot, or a portion or fragment of the clot has gotten into the circulation and it continues in circulation until it becomes fastened to the channel in which it is circulating, that is, it gets in a smaller channel where its size prevents its continuing.

Q. Doctor, is it not a fact that in the case of surgery, embolism may also come from the fact that the patient is immobilized?

A. That is right, yes, sir.

Q. In your opinion, Doctor, is a pulmonary embolism accidental?

(Testimony of Dr. F. A. Pittenger.)

A. In my opinion it is not.

Q. State your reasons for that answer?

A. My personal interpretation of an accident is that it is an unusual and unexpected incident that causes a catastrophe of some degree. Pulmonary embolism following surgery or a surgical operation in the nature of a hernia or a pelvic operation is not unexpected because statistically it is the largest single cause of death following surgical operations such as I mentioned. To all men doing major surgery that is one of the biggest hazards in the procedure. [144] He always has that in mind and is on the lookout for that sort of thing, consequently, I don't consider it unexpected.

Q. Doctor, would you say in your opinion that pulmonary embolism is reasonably foreseeable?

A. No, I don't think it is reasonably foreseeable, but it is reasonable to expect one.

Q. It is reasonably expectable?

A. Yes, sir.

Q. Are there preventative measures to eliminate or mitigate such embolisms?

A. Recently there has been an effort to use medication which the profession thought might have some bearing on the formation of embolisms, to prevent the formation of the embolus; then there is the after treatment in which we mobilize the patient through some form of movement that will help the circulation; to guard against complete immobilization, and after the damage is done sometimes efforts are made

(Testimony of Dr. F. A. Pittenger.)

to prevent further embolisms or embolus. I know of no method possible to use in all cases because the end result is that they are more or less hazardous in themselves.

Q. Doctor, isn't it a fact that fifty per cent of post-operative deaths are due to embolism?

A. Yes, that is practically correct. [145]

Q. Have you read the deposition of Doctor Call in these cases? A. Yes, sir.

Q. Have you examined the hospital record exhibit "A"? A. Yes, sir.

Q. Assuming the facts therein to be true and that Harry Wilson died at about five o'clock A. M., April 8, the morning after the operation, in your opinion was the pulmonary embolism accidental, was it an accident?

A. Not under my interpretation of an accident.

Q. Would you say under those facts the pulmonary embolism was probable and to be anticipated and expected?

A. It was to be anticipated.

Q. And expected? A. Yes, and expected.

Q. Doctor, from an examination of the hospital record, exhibit "A", from midnight on April 7th, to the time of his death, in your opinion, was there a condition of profound shock? A. Yes, sir.

Q. Would this be a symptom of pulmonary embolism and could it be symptomatic of coronary thrombosis? A. Yes, sir, it could.

Q. Will you explain that answer?

(Testimony of Dr. F. A. Pittenger.)

A. I am unable to tell from the records to my own satisfaction whether this was a pulmonary embolism or some other type of chest embolus. [146]

Q. Doctor, assuming that the patient Harry Wilson was operated on for hernia about eight or nine o'clock on the morning of April 7, and that he died of pulmonary embolism about five o'clock on the morning of the 8th. If he did die from such embolism would the operation for hernia be a contributing cause? A. Yes, sir.

Q. Assume, Doctor, that Harry H. Wilson was suffering from hernia and that he was operated on for such a hernia and his death followed within approximately twenty hours thereafter, either from pulmonary embolism or some other similar cause, would the fact that he was operated on for hernia be a contributing cause of his death? A. Yes, sir.

Q. Doctor, state whether or not the hernia sustained by Mr. Wilson as disclosed by the testimony of Doctor Call and the exhibit "A" introduced in evidence, was a contributing cause of the death of Harry H. Wilson? A. Yes, sir.

Q. Doctor, in your opinion, are post-operative deaths in the case of hernia and other pelvic operations more prevalent than other types of operations?

A. Yes, sir, they are. They are more prevalent than in other general operations?

Q. In your opinion, Doctor, is post-operative embolus a natural [147] consequence of surgical procedure and immobilization incident thereto?

(Testimony of Dr. F. A. Pittenger.)

A. Yes, sir.

Q. And post-operative pulmonary embolism is reasonably foreseeable in the sense that it is expected?

A. Yes, they are expected.

Q. If post-operative pulmonary embolism is an accident, what would you say as to other causes of death?

A. All deaths are accidental if that is true.

Q. But you don't think it is true?

A. I don't believe it is true.

Mr. Eberle: That is all, Doctor.

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### JAMES L. STEWART

Called as a witness by the defendant, after being first duly sworn testifies as follows:

#### Direct Examination

By Mr. Eberle:

Q. State your name, Doctor?

A. James L. Stewart.

Q. Your profession?

A. Physician and surgeon.

Q. You live in Boise? A. Yes, sir.

Q. You are licensed to practice in Idaho?

A. Yes, sir. [148]

Q. State briefly your educational qualifications?

A. I graduated from Rush Medical College, University of Chicago, in 1899.

Q. Where have you practiced?

A. One year in Nebraska, a year and a half in Chihuahua, Mexico, and since March, 1902 in Boise.



(Testimony of Dr. James L. Stewart.)

Q. In your forty-six years in Boise have you specialized in surgery?

A. Yes, most of that time.

Q. You have performed many thousands of operations?

A. Yes, there are some twenty thousand histories on file in there now.

Q. You were chief-of-staff at St. Luke's Hospital for how many years, Doctor?

A. Chief of the organized staff for twenty-nine years and chief of the hospital for thirty-four years.

Q. In your practice of surgery you are familiar with embolisms and particularly pulmonary embolism?

A. Yes, sir.

Q. Doctor, in your opinion where a hernia operation was skilfully performed without unusual incident and death occurred within twenty hours after the operation, would you say that such embolism was accidental—if death was from pulmonary embolism?

A. No, I don't think I could say that. [149]

Q. Would you say it was expected?

A. It is something that could be expected in a certain number of cases.

Q. Post-operative pulmonary embolism is something that is reasonably foreseeable?

A. Yes, sir, it is foreseeable.

Q. Are pulmonary embolisms more prevalent in hernia and pelvic operations than in other general operations?

A. Yes, more so than in other classes of operations; next in line would be fractures.

(Testimony of Dr. James L. Stewart.)

Q. Is there preventative procedure to prevent or mitigate pulmonary embolism?

A. There is an effort to do that by the use of heparin and dicumerin and certain post-operative exercise; the use of the legs, sitting up in bed and so forth, but none are very effective.

Q. Doctor, you have read the hospital records as a part of the deposition of Doctor Call, which is marked as exhibit "A"?      A. Yes, I have.

Q. From an examination of that record can you tell us what it shows with reference to the diagnosis of the cause of Mr. Wilson's death?

A. I would say that it is not clear from the record here that the patient died from pulmonary embolism, but rather that he had a progressive heart failure as indicated by [150] the irregular pulse and the type of respiration which resembles Cheyne-Stokes respiration.

Q. Just explain to us the symptomatology as indicated by this report?

A. Well, the symptomatology is that there was a slight increase in temperature, diaphoresis—that is sweating; irregular pulse and the Cheyne-Stokes type of respiration would point more to progressive heart failure. The ordinary symptoms of pulmonary embolus are pain in the chest, some coughing and small amount of blood frequently, with difficulty of breathing and secondary heart failure.

Q. Now, Doctor, in a clean surgical case where the operation was skilfully performed without incident,

(Testimony of Dr. James L. Stewart.)

tell us the percentage of deaths of all post-operative deaths, that are due to pulmonary embolism?

A. Well, I don't know the exact percentage but I would say it is very high, perhaps seventy or eighty.

Q. Seventy or eighty per cent of all post-operative deaths, where the operations are skilfully performed and are clean operations, are due to pulmonary embolism?

A. I should also say pulmonary embolisms or cerebral embolism.

Q. Going back to exhibit "A", can you tell us whether in your opinion the reference to a heart condition during the last six or seven hours before death indicated a weakness of the heart muscles or pulmonary embolism? [151]

A. I would say it indicated a weakness of the heart muscle.

Q. Where there is a weakness of the heart muscle, is there also a natural consequence from surgical procedure that might result in death without a pulmonary embolism? A. Yes, sir.

Q. State what happens?

A. The condition of secondary shock might occur due to the general condition of the patient.

Q. And his heart would not stand the shock of the surgery?

A. That is right, yes, I might say that.

Q. Now, Doctor, in view of the hospital record, in your opinion, could the cause of his death be correctly diagnosed without an autopsy? A. No.

(Testimony of Dr. James L. Stewart.)

Q. Assuming that Mr. Wilson was sixty-one years of age at the time of death, what would you say as to whether post-operative pulmonary embolism would be more probable and expected in his case than in that of a younger person?

A. No, I don't think so, because it occurs in all ages.

Q. Assuming, Doctor, that Harry H. Wilson was afflicted with a hernia and that he was operated on for this hernia at about eight o'clock or nine o'clock a.m., April 7, 1947, and that he died a little before five o'clock a.m., April 8, 1947, from pulmonary embolism or coronary embolism, [152] would hernia and the treatment therefor be a contributing cause to his death?

A. Yes, sir.

Q. Would the operation for the hernia under such condition and the existence of the hernia be a contributing cause to his death, if he had died from other causes?

A. Yes, sir, it would.

Q. State whether or not the fact that he had a hernia and was operated for the hernia and subsequently died be in and of itself a contributing cause to his death?

A. Yes, sir.

Q. Is embolism a natural consequence of operative procedure or immobilization, where it occurs?

A. It is in certain instances. It does occur.

Q. It is a natural consequence where no intervening factor takes place such as infection or unskilful procedure?

A. Yes, it occurs.

Q. Doctor, having considered the testimony of

(Testimony of Dr. James L. Stewart.)

Doctor Call, and the hospital record as shown by exhibit "A" state whether the death of Harry H. Wilson was caused wholly or partly, or the result contributed to by the existence of the hernia and the treatment therefor?       A. Yes, it was.

Mr. Eberle: I think that is all, thank you, Doctor. [153]

(Statements of Counsel and Court as to preparation of transcript reported but not transcribed.)

(Statements of Counsel and Court concerning copying of decisions of the Supreme Court of Missouri in certain cases into this record reported but not transcribed.)

The Court: I can relieve your mind on that matter. If the Court determines that the law of the State of Missouri applies to this, then I will consider the law of Missouri, and any cases considered by the Supreme Court of the State of Missouri will be considered by this Court. I recognize counsel here are able counsel and I don't want to deny them anything they think is necessary in this record. I have heard of pleadings and records and so forth being made a part of the record but never decisions of other Courts copied. However, as I say, I don't want to bar you from doing anything you think is necessary.

Mr. Merrill: Then I will offer them in evidence as exhibits. The Reporter has the name.

The Court: The Court will overrule the objection, or rather will admit them as exhibits at this time subject to the objection with the understanding that the



(Testimony of Dr. James L. Stewart.)

Court will determine this on the determination of the case finally.

Mr. Merrill: And they may be considered in Statements, etc., [154] evidence.

The Court: Subject to Mr. Davis' objection. If I sustain Mr. Davis' objection they will be stricken.

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### WALTER M. JONES

Recalled as a witness by the defendant, having heretofore been duly sworn, testifies as follows:

#### Direct Examination

By Mr. Merrill:

Mr. Jones, I call your attention to plaintiff's exhibit "2", down at the bottom of that exhibit there are four letters and figures?      A. Yes, sir.

Q. Read them?

A. C-51-2; C-50-2; C-53-2, C-52-2.

Q. Is it C-53-2 or C-53-1?

A. That's right, it is C-53-1.

Q. What do those figures and letters have reference to?

A. Those are the usual forms mailed to the beneficiary upon being advised of the death of the policyholder.

Q. What are those called?

A. Proof of death.

Q. Name them?

A. Beneficiary's statement.

Q. Is that the claimant's statement?



(Testimony of Walter M. Jones.)

A. Yes, sir. [155]

Q. Is that Statement introduced as exhibit 5?

A. As number 5.

Mr. Merrill: May it be admitted that exhibit 53-1 is the undertaker's statement.

Mr. Davis: There is no exhibit 53-1.

Q. Mr. Jones, I hand you exhibit marked "62" and ask you if that is what is referred to as C-53-1?

A. Yes, sir.

Q. And exhibit "5" is C-51-2?

A. That is right.

Q. And there is missing C-52-2?

A. That is one missing, there are two.

Q. What are those two missing?

A. Statement of attending physician, and the statement of eye witness.

Q. Are those four statements always sent out when the Company is advised of the death of a policy holder?

A. Yes, sir, I think they are.

Q. Those are the forms required to be submitted to the Company?            A. Yes, sir.

Mr. Merrill: That is all, you may examine.

#### Cross-examination

By Mr. Davis:

Q. Those are matters taken care of in Kansas City?            A. Yes, sir. [156]

Q. That is one of the things they do in Kansas City that you know about?

(Testimony of Walter M. Jones.)

A. Yes, that is the regular procedure.

Mr. Davis: That is all.

Mr. Merrill: That is all, we rest.

Mr. Davis: No rebuttal [157]

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Certificate

State of Idaho,

County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the duly qualified and appointed official Court reporter of the United States District Court for the District of Idaho; that I reported in shorthand the evidence and proceedings had in and about the trial of the above entitled cause, and thereafter transcribed in long-hand (typewriting) the same, and that the foregoing transcript is a true and correct transcript of the testimony given, and the proceedings had in and about the trial of the said cause.

In witness whereof I have hereunto set my hand this 29th day of July, 1948.

G. C. VAUGHAN,  
Official Reporter.

[Endorsed]: Filed August 4, 1948.

[Endorsed]: No. 12284. United States Court of Appeals for the Ninth Circuit. Cecelia J. Wilson, Appellant, vs. Business Men's Assurance Company of America, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed July 5, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the Circuit Court of Appeals of the United States for the Ninth Circuit

No. 12284

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a Corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF.

Comes Now the appellant and hereby adopts as her Statement of Points upon which she intends to rely on appeal, the Statement of Points on which Cecelia J. Wilson Intends to Rely on Appeal heretofore filed with the Clerk of the United States District Court for the District of Idaho, from which court this

appeal is taken, such Statement of Points being that appearing in the transcript certified to this Court for said Clerk of the United States District Court for the District of Idaho.

Appellant hereby designates for printing as the parts of record necessary for the consideration of said points, the entire transcript, including transcript of evidence, as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, expressly excluding, however, the Exhibits, and appellant prays that such Exhibits be considered in their original form by this Court as a part of the record on such appeal.

/s/ B. W. DAVIS,

Attorney for Appellant.

Service acknowledged July 13, 1949.

[Endorsed]: Filed July 14, 1949.

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[Title of Circuit Court and Cause.]

## DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED

Comes now the appellee and designates as additional parts of the record for printing, which is necessary for a consideration of the cause, the following: All exhibits introduced as evidence in said cause save and except plaintiff's exhibit No. 7, which is the original hospital record, defendant's exhibit No. 8, which is the deposition of Dr. Call (assuming said deposition has been read into the record and is a part of the testimony to be printed), plaintiff's exhibit No.

12, which is a cancelled check, defendant's exhibits Numbers 13 and 14, which are court cases.

/s/ A. L. MERRILL,

/s/ R. D. MERRILL,

/s/ W. F. MERRILL,

Attorneys for Appellee.

Service acknowledged July 15, 1949.

[Endorsed]: Filed July 18, 1949.

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In the Circuit Court of Appeals of the United States  
for the Ninth Circuit

CECELIA J. WILSON,

Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY  
OF AMERICA, a corporation,

Appellee.

APPLICATION FOR ORDER DISPENSING  
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of Cecelia J. Wilson respectfully shows:

That an appeal has been perfected by your petitioner to this Court from a judgment rendered in the United States District Court for the District of Idaho, in a suit wherein Cecelia J. Wilson was plain-

tiff and Business Men's Assurance Company of America, a corporation, was defendant.

There were introduced in evidence at the trial of the cause by the respective parties, the following exhibits, to wit:

Exhibits 1 to 4 inclusive, consisting of Letters between B. W. Davis and Appellee;

Exhibit 5, Beneficiary Statement;

Exhibit 6, Undertaker's Statement;

Exhibit 7, Hospital Record;

Exhibit 11, Insurance Policy;

Exhibit 12, Cancelled Check,

all of the above Exhibits being introduced on plaintiff's case.

Exhibit 9, Photostatic Proof of Death;

Exhibit 10, Certificate of Death;

Exhibit 13, Decision of the Supreme Court of Missouri;

Exhibit 14, Decision of the Supreme Court of Missouri,

all of the above exhibits being introduced on defendant's case.

That the exhibits which appellant believes would be impractical and difficult to print and for which appellant makes application for an order dispensing with the printing are:

Exhibit No. 7, Hospital Record, consisting of reports and charts of an involved and lengthy character and which would be costly and difficult to print;

Exhibit No. 11, Insurance Policy which is lengthy and would be difficult to print;



Exhibit No. 13 and Exhibit No. 14, consisting of court cases. The Appellee has under date of July 15, 1949, designated all of the Exhibits except Exhibits Nos. 7, 8, 12, 13 and 14 as exhibits to be printed.

Exhibit No. 8, we understand, was read into the record and is a part of the testimony which should dispense with its printing.

All of said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. There is attached hereto an affidavit of B. W. Davis which is made a part hereof.

Wherefore, your petitioner prays for an order dispensing with the printing of Plaintiff's and Appellant's Exhibits Nos. 7, 8, (in the event Exhibit 8 was not read into the record), 11, and Appellee's exhibits numbered 13 and 14. Appellant further prays that in accordance with the designation of the appellee, the cancelled check, Exhibit No. 12, be included in any order issued by the court dispensing with the printing of exhibits; and appellant prays that said original exhibits be considered by this court on appeal.

Dated this 19th day of July, 1949.

/s/ B. W. DAVIS.

Service acknowledged July 20, 1949.

So ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ HOMER T. BONE,

/s/ WM. E. ORR,

United States Circuit Judge.

[Title of Court of Appeals and Cause.]

AFFIDAVIT OF B. W. DAVIS

State of Idaho,  
County of Bannock—ss.

B. W. Davis, being first duly sworn upon his oath, deposes and says:

That he is the attorney for Cecelia J. Wilson, appellant herein, and makes this affidavit on behalf of appellant for the purpose of securing an order dispensing with the printing of certain exhibits, all as stated in the application for order hereto attached;

That the exhibits which it is requested be not printed in the Application for Order attached present difficulties and would decidedly encumber the record and that the printing of such exhibits would be costly, all as will more particularly appear from an examination of said exhibits, and that such exhibits may properly serve the appellate court in their original form.

/s/ B. W. DAVIS.

Subscribed and sworn to before me this 19th day of July, 1949.

[Seal]     /s/ LAURA S. GOUGH,  
Notary Public, Residing at Pocatello, Idaho.  
My commission expires 9-18-50.

[Endorsed]: Filed July 22, 1949.